3. *The Fifth Circuit Applied an Inappropriate Standard*

The Fifth Circuit opinion recites the appropriate standard at the beginning of its opinion. (App., *infra*, 3a-4a). However, the court did not apply this standard. In the opinion the court treated the Plan language as though it were not inconsistent or ambiguous. The court stated that the "plain language" of the Plan "means that when an employee or his estate accepts Occupational Benefits Plan Benefits, the employee or his estate must surrender to MHHS all of its rights against third parties." (App., *infra*, 15a). In support the court stated: "Article 11.1 . . . states that by participating in the Occupational Benefits Plan, an employee also obligates the legal representative of his estate and that 'the Plan shall be fully subrogated to any recovery or right of recovery that the estate may have against any third party.'" (*Id.*) The Court simply cut out the very language that made the Plan inconsistent, the very language giving rise to the Committee's right to interpret the Plan. Before the sentence was unilaterally redacted by the Fifth Circuit, the sentence actually read:: "the Plan shall be fully subrogated to any recovery or right of recovery that the estate may have against any third party on account of, or arising out of, the Employee's Bodily Injury, Disease or Cumulative Trauma, including without limitation, any wrongful death claim or action." (App., *infra*, 125a). The court simply deleted the "wrongful death" language. After deleting the very language giving rise to the dispute, the court ruled on the issue based on the "plain language" of the plan—as though it were not inconsistent. The court did not consider the entire sentence and attempt to determine whether the Committee's interpretation was "beyond the bounds of reasonable judgment," based on all

the language in the Plan as they were bound to do under *Firestone*. *Firestone*, 489 U.S. at 111; RESTATEMENT (SECOND) OF TRUSTS § 187 note. e (1959) (App., *infra*, 113a). The court simply supplanted its judgment for that of the administrator, rather than applying the abuse of discretion standard. *See e.g.*, RESTATEMENT (SECOND) OF TRUSTS § 187 note e (1959) (App. *infra*, 113a) ("The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee."). The Fifth Circuit simply applied a "plain language" analysis, not an abuse of discretion analysis.

III. THE FIFTH CIRCUIT'S OPINION EMASCULATES CONGRESS'S POLICY AND THIS COURT'S RULINGS PROTECTING THAT POLICY

Under the Fifth Circuit's opinion, contrary to *Firestone*, a plan administrator can *never* have discretion to construe inconsistent plan terms. The Plan language was inconsistent, if not contradictory. The Committee had to determine how to give meaning to a sentence that stated the Plan was subrogated to all of the estate's claims, including but not limited to wrongful death claims. The Committee had to decide whether to delete everything in the last sentence of article 11.1 after "estate's claims" in order to ignore the "wrongful death language," or whether to not ignore "including," giving the remainder of the sentence meaning. Either way *someone*, be it the Committee or a court, had to determine which language to ignore. The Fifth Circuit, apparently dissatisfied with the Committee's interpretation, circumvented the rule in *Firestone v.*

Bruch by falsely stating that the Committee's interpretation was against the "plain language" of the Plan. But *any* interpretation would be contrary to some of the Plan's subrogation language. The one the Fifth Circuit adopted is *also* against the "plain language" of the Plan: it ignores the Plan's subrogation rights to "wrongful death" claims. Where a Plan is inconsistent, *any* interpretation must ignore some language. Therefore, under the Fifth Circuit's standard, *Firestone v. Bruch* will never apply where the Plan language is inconsistent. This ruling emasculates *Bruch*, taking the authority to interpret a Plan out of the hands of plan administrators and placing it in the hands of the court. *See Firestone*, 489 U.S. at 111 (teaching that the plan administrator has the authority to construe inconsistent plan terms under ERISA).

IV. THE FIFTH CIRCUIT'S OPINION THREATENS THE CONTINUED EFFICACY OF CONGRESS'S ERISA POLICY AND THIS COURT'S RULINGS PROTECTING THAT POLICY

Congress, through ERISA, ensures the continued efficacy and financial soundness of voluntary, private employee benefit plan by creating an enforceable fiduciary relationship between the plan administrator (the trustee) and the participating employees. 29 U.S.C.A. §§ 1102(a)(1) (App. *infra*, 46a), 1001b (App., *infra*, 43a-45a) , 1002(16)(A)(ii) (App., *infra*, 53a), 1002(21)(A) (2005) (App., *infra*, 55a). As this Court stated, "ERISA abounds with the language and terminology of trust law," and therefore ERISA plan administrators, as fiduciaries, are governed by the principles of trust law. *Firestone*, 489 U.S. AT 111; *see*

also H.R. Rep. No. 93-533, p. 12 (1973) (App., *infra*, 80a) ("[ERISA], in essence, codifies and makes applicable to these fiduciaries [plan administrators] certain principles developed in the evolution of the law of trusts").

Under the principles of trust law, a plan administrator has a fiduciary duty to manage the assets of the ERISA plan to ensure the plan is financially sound in order to benefit the participants, thereby fulfilling the plan's purpose. RESTATEMENT (SECOND) OF TRUSTS § 176 (1959) (App. *infra*, 107a); *Reinecke v. Smith*, 289 U.S. 172, 176-77 (1933). Where there is more than one beneficiary, the administrator is under a duty to treat *all* beneficiaries impartially and equally. RESTATEMENT (SECOND) OF TRUSTS § 183 (1959) (App. *infra*, 110a); *see also, e.g.*, *Dennis v. Rhode Island Hospital Trust*, 744 F.2d 893, 897 (1st Cir. 1984) (trustee violated duty of impartiality as between income and remainder beneficiaries by retaining rental property (income) while the sale value of the property (remainder) decreased). Correspondingly, under trust law, a plan administrator has a duty to ensure that the entrusted plan assets are managed so that they are financially sound and equally able to provide benefits to *all* participants, both current and future beneficiaries. 29 U.S.C.A. § 1001(c) (App, *infra*, 30a-31a); RESTATEMENT (SECOND) OF TRUSTS §§ 176 (App. *infra*, 107a), 183 (App., *infra*, 110a) (1959). The duties of protecting the plan assets and impartiality are, of course, intertwined. If, for example, a plan administrator fails to enforce its subrogation rights against a participant that has received benefits and the plan, therefore, does not recoup its expenses, the plan administrator has violated both duties. The administrator has not properly managed the plan assets to ensure its future financial soundness. Also, the plan administrator has been impartial: it has

failed to enforce its subrogation rights against certain participants, giving them a windfall (both the benefits *and* the right to sue) at the expense of *all* other participants of the plan. Together, these duties make certain that the plan administrator (the trustee) is ensuring that no one beneficiary or group of beneficiaries benefits from the plan (the trust) at the expense of all other participants.

ERISA places unusual burdens on plan administrators fulfilling these duties. In order for a plan administrator to fulfill its fiduciary duties to manage the plan, protect plan assets, and ensure *all* participants have impartial and equal access to plan benefits, the administrator *must* be able to accurately assess the future benefits expenses the plan will be required to pay. If the administrator cannot assess these expenses, the administrator cannot create a fiscal and managerial policy for the plan to ensure its continued financial soundness and efficacy. The administrator can only accurately assess the future benefit expenses if the administrator can read the plan and form a reasonable interpretation of the plan language with confidence that the interpretation will not be overruled. Every plan will, however, have some ambiguities and vagueness. Individual participants of a plan will seek to exploit those ambiguities to maximize *individual* benefits without regard the plan as a whole and the effects upon other participants. For a Plan to work it must be managed and construed so as to benefit employees as a whole.

This Court's holding in *Firestone Tire and Rubber Co. v. Bruch* protects the administrators' ability to ensure the efficacy and financial soundness of ERISA plans. *Firestone*, 489 U.S. at 111. The Fifth Circuit's opinion, by

refusing to apply the *Bruch* standard in this case, undermines this policy by, in effect, granting courts the ability to simply supplant their discretion for the plan administrators where a plan is inconsistent. As discussed above, under the Fifth Circuit's standard, *any* interpretation of an inconsistent plan will be an "abuse of discretion," leaving plan administrators no discretion. Without this discretion, plan administrators cannot formulate fiscal and managerial policies for their ERISA plans with any confidence, undermining Congress's goal of protecting the efficacy and financial soundness of ERISA plans.

CONCLUSION

Therefore, Petitioner respectfully requests that this Court grant this petition for writ of certiorari, reverse the decision of the United States Court of Appeals for the Fifth Circuit, and hold that the Fifth Circuit's opinion applied an inappropriate standard, that the Committee's interpretation was not an abuse of discretion, and therefore the Committee's interpretation must stand.

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(any footnotes trail end of each document)

No. 04-20349
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES ATTEBERRY SR, ET AL,
Plaintiffs

v.

MEMORIAL-HERMANN HEALTHCARE SYSTEMS, On Behalf and for the Benefit of The Estates, Heirs, Devisees, Legatees, Spouses, Children and/or Parents of Charles Atteberry Jr.,
Plaintiffs – Appellees

v.

MEMORIAL-HERMANN HEALTHCARE SYSTEM; MEMORIAL-HERMANN HOSPITAL SYSTEM,
Plaintiffs - Appellants - Appellees

v.

BEN ETHRIDGE,
Intervenor - Plaintiff-Appellee

v.

DALINDA SHELTON; CAROL ANN PITTMAN, also known as Carol Ann Peterson, Independent Executrix of the Estate of John Linwood Pittman, Jr.,

Deceased and Individually as Beneficiary of John Linwood Pittman, Jr.,
Intervenor - Plaintiffs - Appellants

v.

EUROCOPTER DEUTSCHLAND, GMBH, ET AL,
Defendants

April 1, 2005, Filed

JUDGES: Before GARWOOD, BENAVIDES, and STEWART, Circuit Judges.

OPINIONBY: BENAVIDES

OPINION: BENAVIDES, Circuit Judge:

I. INTRODUCTION

This action arises from the crash of a Life Flight helicopter owned and operated by Memorial-Hermann Healthcare System and Memorial-Hermann Hospital System (collectively "MHHS"). All three MHHS employees aboard the helicopter - Charles Atteberry, Jr., John Pittman, Jr., and Silvia Lynn Ethridge - perished in the crash. At the time of their deaths, the employees were covered by MHHS' ERISA Occupational Benefits Plan (the "Occupational Benefits Plan") which essentially provided death benefits of $ 1,000,000 to the estate of the deceased employee or, in the absence of a will, to the employee's heirs at law.

This appeal involves the claims of three separate appellants, Dalinda Shelton ("Shelton"), MHHS, and

Carol Pittman ("Pittman"). Each of the disputes centers on the scope and extent of MHHS' claimed subrogation rights following the payment of death benefits pursuant to MHHS' Occupational Benefits Plan. More specifically, Shelton appeals the district court's grant of summary judgment against her and its conclusion that MHHS' subrogation right gives MHHS the right to control the prosecution and settlement of the claims of the Estate of Silvia Lynn Ethridge (the "Ethridge Estate"). MHHS appeals the district court's denial of its motion for summary judgment with respect to Ben Ethridge and its conclusion that MHHS is not subrogated to Ben Ethridge's wrongful death claim arising from the death of his daughter Silvia Ethridge. Pittman appeals the district court's grant of partial summary judgment against her - as well as its subsequent denial of her motion for partial summary judgment against MHHS - and its conclusion that MHHS is subrogated to her claims, both as an individual and as the independent executrix of the Estate of John Linwood Pittman, Jr. (the "Pittman Estate").

Having reviewed the record and considered the briefs and arguments on appeal, we uphold the district court's grant of summary judgment against Shelton and its denial of MHHS' motion for summary judgment with respect to Ben Ethridge. However, we reverse the district court's grant of summary judgment against Pittman in her individual capacity.

II. STANDARD OF REVIEW

The parties agree that MHHS' ERISA Occupational Benefits Plan Administrative Committee (the

"Administrative Committee") had discretionary and final authority to interpret MHHS' Occupational Benefits Plan and make all necessary factual findings. When a plan administrator has such discretionary authority, this Court applies an abuse of discretion standard. Pickrom v. Belger Cartage Serv., Inc., 57 F.3d 468, 471 (5th Cir. 1995). This Court reviews *de novo* the district court's holdings regarding whether a plan administrator has abused its discretion. Threadgill v. Prudential Sec. Group, Inc., 145 F.3d 286, 292 (5th Cir. 1998).

III. DISCUSSION

A. Dalinda Shelton and Ben Ethridge

1. Factual and procedural history

On December 23, 1999, MHHS paid a death benefit under its Occupational Benefits Plan in the amount of $ 1,050,816 to the Ethridge Estate through Dalinda Shelton; Shelton is Silvia Ethridge's same-sex domestic partner, the personal representative and independent executrix of the Ethridge Estate, and the principal beneficiary under Silvia Ethridge's will. Payment of the death benefit to the estate representative is consistent with Article 8.2 of MHHS' Occupational Benefits Plan which states that "in the event of the Death of an Eligible Employee, any Death Benefits payable hereunder shall be paid to the personal representative of the estate of the deceased Eligible Employee after the Administrative Committee receives appropriate directions."

At the time the death benefit was paid, Shelton and the

Occupational Benefits Plan Administrator for MHHS entered into an Acknowledgment of Receipt of Benefits, Subrogation Rights and Confidentiality Agreement (the "Agreement"). As part of the Agreement, Shelton recognized that she received funds from MHHS' Occupational Benefits Plan and acknowledged that MHHS was subrogated to the Ethridge Estate's claims and causes of action. The Administrative Committee subsequently determined that MHHS' subrogation rights gave it the right to pursue and settle the Ethridge Estate's claims without the participation of Shelton as the Ethridge Estate representative.

Ben Ethridge, for his part, denies receiving Occupational Benefits Plan death benefits. In his deposition testimony, Ben Ethridge acknowledged receipt of a share of the Occupational Benefits Plan death benefit, but stated that he received that money not from the Occupational Benefits Plan, but as a gift from Shelton. Although Ben Ethridge did not receive Occupational Benefits Plan death benefits, he did receive other insurance proceeds resulting from his daughter's death; those proceeds were paid to him through separate insurance policies that are different from the Occupational Benefits Plan that is at the heart of the instant dispute. Specifically, Ben Ethridge received life insurance and accidental death and dismemberment insurance proceeds pursuant to a Beneficiary Designation Form, on which Silvia Ethridge designated both Ben Ethridge and Dalinda Shelton as her designated beneficiaries. At oral argument, it was conceded by MHHS that while the Beneficiary Designation Form determined how the life insurance and accidental death and dismemberment

insurance proceeds were to be paid out in the event of Silvia Ethridge's death, it did not set forth how the death benefit under MHHS' Occupational Benefits Plan was to be disbursed.

The Administrative Committee determined that the Beneficiary Designation Form governed the disbursement of the death benefit under MHHS' Occupational Benefits Plan and that Ben Ethridge was a designated beneficiary who received Occupational Benefits Plan monies, albeit indirectly from Shelton. The Administrative Committee concluded that because Ben Ethridge was a beneficiary of Occupational Benefits Plan death benefits, his wrongful death cause of action was subrogated to MHHS, which could then sue third parties on Ben Ethridge's behalf.

MHHS filed suit against the third-party helicopter manufacturer on behalf of, *inter alios*, Ben Ethridge and the Ethridge Estate. The district court subsequently permitted Shelton and Ben Ethridge to intervene in the action. Shelton claimed that as executrix of the Ethridge Estate, she had the right to control the prosecution and settlement of Silvia Ethridge's survival action. Ben Ethridge contended that his wrongful death cause of action was not subrogated to MHHS because he was not a recipient of Occupational Benefits Plan death benefits and that, therefore, MHHS could not sue the helicopter manufacturer on his behalf.

MHHS moved for summary judgment against Shelton, as executrix and beneficiary, and against Ben Ethridge. The district court granted MHHS' motion for summary judgment with respect to Shelton and concluded that

MHHS, as subrogee, has the authority to prosecute and settle the claims of the Ethridge Estate without the consent or participation of the Ethridge Estate representative. The district court denied MHHS' motion for summary judgment with respect to Ben Ethridge and concluded that Ben Ethridge's claims were not subrogated to MHHS because he had not received Occupational Benefits Plan death benefits. Shelton and MHHS subsequently appealed the judgment of the district court.

2. Shelton's claims

Because it is undisputed that MHHS is subrogated to the Ethridge Estate's causes of action, the sole issue of contention between Shelton and MHHS is the meaning of the term "subrogation" as used in the Occupational Benefits Plan. Shelton contends that the Administrative Committee's interpretation of the meaning of subrogation amounts to an abuse of discretion because MHHS' subrogation rights do not allow MHHS the right to exclusively control the Ethridge Estate's causes of action without the consent or participation of the Ethridge Estate representative.

We conclude that the Administrative Committee's interpretation of the meaning of subrogation is legally correct under both an ordinary meaning analysis and the three-part test this Court employs to determine the legal correctness of an ERISA plan administrative committee's determination.

a. Ordinary meaning analysis

Subrogation is not defined in the Occupational Benefits Plan and its meaning cannot be unambiguously discerned from the Occupational Benefits Plan language. However, as it is ordinarily understood, "subrogation simply means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights." Black's Law Dictionary 1468 (8th ed. 2004). Put differently, "in a subrogation action, it is well established that there is only one cause of action for the insured's injuries . . . . [and t]he insurer can assert its subrogation claim independently of the insured." Prudential Prop. and Cas. Co. v. Dow Chevrolet-Olds, Inc., 10 S.W. 3d 97, 100 (Tex. App. Texarkana 1999). Moreover, under Texas state law, "the subrogees stand in the shoes of the one whose rights they claim." Interstate Fire Ins. Co. v. First Tape, Inc., 817 S.W.2d 142, 145 (Tex. App. Houston 1991). Therefore, if there is only one cause of action for an insured's injuries, and in a subrogated action that cause of action belongs to the insurance company subrogee, it follows that the insurance company subrogee has the right to control the subrogated cause of action.

As applied to the instant case, the Ethridge Estate has a cause of action on behalf of Silvia Ethridge. However, under the clear terms of the Occupational Benefits Plan, by accepting Occupational Benefits Plan death benefits, the Ethridge Estate has subrogated its cause of action to MHHS, which then stands in the shoes of the Ethridge Estate. Because there is only one cause of action, and MHHS received from the Ethridge Estate the right to control that cause of action, as the party in control MHHS is entitled to prosecute and settle the

Ethridge Estate's claims without seeking approval from the Ethridge Estate representative.

b. Legally correct interpretation

Moreover, the Administrative Committee gave the meaning of subrogation in the Occupational Benefits Plan a legally correct interpretation under the three-part test employed by this Court to determine the legal correctness of an ERISA administrative committee's determination. Pickrom v. Belger Cartage Serv., Inc., 57 F.3d 468, 471 (5th Cir. 1995). Under the three-part test, this Court considers: (1) whether the administrative committee has given the plan a uniform construction; (2) whether the administrative committee's interpretation is consistent with a fair reading of the plan; and (3) whether different interpretations of the plan will result in unanticipated costs. Id.

Regarding the first factor, when there is no evidence in the record as to whether an administrative committee has given the plan a uniform construction, this Court should proceed to the other two factors. *See* id. Because there is no evidence in the record that the Administrative Committee previously had to construe the scope of the Occupational Benefits Plan's subrogation rights, our analysis necessarily turns to the remaining two factors.

Regarding the second factor, the Administrative Committee's interpretation of the term "subrogation" is consistent with a fair reading of the Occupational Benefits Plan. The Occupational Benefits Plan language limits MHHS' recovery to the extent of "any Benefit

payments made under the Plan," but does not limit MHHS' right of subrogation. The Occupational Benefits Plan language, in fact, grants MHHS a broad subrogation right since it states that MHHS "has the right to pursue any action to enforce its subrogation rights against a third party." Therefore, a plain reading of the Occupational Benefits Plan language gives MHHS the right of subrogation to all of the Ethridge Estate's claims, with MHHS' right of recovery in any action against a third party limited to the amount of the death benefit paid to the Ethridge Estate.

Regarding the third factor, a different interpretation of the Occupational Benefits Plan than the one adopted by the Administrative Committee would result in unanticipated costs to MHHS. If, as Shelton argues, MHHS should not be permitted to prosecute or settle any subrogated claims without the consent of an employee's estate as subrogor, MHHS would be at the mercy of the estate. Pursuant to Article 11.3 of the Occupational Benefits Plan, MHHS has priority over an employee's estate with respect to all funds recovered from third parties, up to the amount of benefits MHHS has paid plus the costs of recovery. If MHHS is not permitted to independently prosecute and settle the claims of an employee's estate, MHHS runs the risk that the estate - having already received funds from MHHS - will hold up settlement negotiations in the hopes of obtaining a larger recovery. An estate that has received funds from MHHS has no incentive to settle its claims for any amount that does not exceed that already paid to it by MHHS, irrespective of how reasonable the settlement offer may be. Adopting an alternate reading of the term "subrogation" would result in unanticipated costs to MHHS, namely the

increased costs of recovering from third parties. Accordingly, we conclude that the Administrative Committee has given a legally correct interpretation to the term "subrogation" as it appears in the Occupational Benefits Plan.

Therefore, for the foregoing reasons, we affirm the judgment of the district court upholding the Administrative Committee's interpretation of MHHS' subrogation rights with respect to any claims of the Ethridge Estate, and rejecting Shelton's argument that she should control or share in the control of the prosecution of any actions brought on behalf of the Ethridge Estate.

3. MHHS' claims

MHHS appeals the district court's denial of MHHS' motion for summary judgment and its holding that Ben Ethridge retained his wrongful death cause of action against third parties because he was not a beneficiary of MHHS' Occupational Benefits Plan death benefits. MHHS contends that the Administrative Committee's determination was not an abuse of discretion for the following reasons: (1) because Silvia Ethridge designated Ben Ethridge as a beneficiary of her Life Insurance and Accidental Death & Dismemberment Insurance Plans, Ben Ethridge also should be considered a designated beneficiary of Occupational Benefits Plan death benefits; (2) under Article 8.2 of the Occupational Benefits Plan, MHHS must pay the Occupational Benefits Plan death benefit as the designated Occupational Benefits Plan beneficiaries request; (3) at the request of Ben Ethridge and Shelton, MHHS made the death benefit check payable to

Shelton as the personal representative of the Ethridge Estate; and (4) Ben Ethridge did receive money from Shelton.

We conclude that the Administrative Committee's determination that Ben Ethridge received Occupational Benefits Plan death benefits and was therefore required to comply with the Occupational Benefits Plan's subrogation and assignment provisions is legally incorrect under the first prong of the abuse of discretion standard articulated *supra*.

MHHS has not demonstrated that Ben Ethridge was a recipient of Occupational Benefits Plan death benefits. Although Ben Ethridge did receive life insurance and accidental death and dismemberment insurance proceeds, which are not at issue in the instant case, he did not receive from MHHS any portion of the Occupational Benefits Plan death benefit, nor was he a designated beneficiary of Occupational Benefits Plan benefits. The entire amount of the death benefit was made payable to Dalinda Shelton as the personal representative of the Ethridge Estate; Ben Ethridge did not receive any money directly from MHHS' Occupational Benefits Plan. Moreover, the money Ben Ethridge did receive from Shelton was a gift to Ben Ethridge and was drawn from Shelton's own funds.

Therefore, because the Administrative Committee's determination that Ben Ethridge received Occupational Benefits Plan death benefits is inconsistent with a fair reading of the Occupational Benefits Plan, we conclude that the Administrative Committee's determination is legally incorrect. *See* Gosselink v. Am. Tel. & Tel., Inc., 272 F.3d 722, 727 (5th Cir. 2001) (holding that it is an

abuse of discretion if an administrative committee interprets a plan in a way that directly contradicts the plain meaning of the plan language). Accordingly, we agree with the decision of the district court denying MHHS' motion for summary judgment as it relates to Ben Ethridge.

B. Carol Pittman

1. Factual and procedural history

Both Carol Pittman, common law wife of the deceased John Pittman, Jr., and John Pittman III and Jennifer Pittman (collectively, the "Pittman children"), the surviving children of the deceased, asserted to MHHS that the $ 1,000,000 death benefit under the Occupational Benefits Plan be paid to them. Unsure who it should pay, on December 21, 2000, MHHS filed a Petition in Interpleader against Pittman and the Pittman children asking that the probate court administering the Pittman Estate determine who, as between Pittman and the Pittman children, was the appropriate payee. MHHS then deposited the $ 1,000,000 death benefit into the court registry. The probate court subsequently issued an Agreed Final Judgment ordering that the funds be released to the "personal representative of the Estate of John Linwood Pittman, Jr." The probate court further determined that Pittman was the duly authorized personal representative of the Pittman Estate.

After Pittman accepted the death benefit provided under the Occupational Benefits Plan, she filed a declaratory judgment action in probate court in which Pittman sought to avoid the subrogation provisions of

the Occupational Benefits Plan. MHHS removed Pittman's claim to federal court and Pittman filed a motion to remand. The district court denied Pittman's motion to remand and consolidated the removed action with MHHS' action against the third-party helicopter manufacturer on behalf of, *inter alios*, Carol Pittman and the Pittman Estate.

On July 30, 2003, MHHS filed with the district court a motion for partial summary judgment against Pittman in her capacity as executrix and beneficiary of the Pittman Estate. MHHS contended that summary judgment was appropriate because the Administrative Committee concluded that Pittman had accepted death benefits under the Occupational Benefits Plan and that MHHS had a right of subrogation to the amounts paid by it plus the costs of prosecuting the claim. Pittman also filed with the district court a motion for partial summary judgment against MHHS.

The district court granted MHHS' motion for partial summary judgment and denied Pittman's motion for partial summary judgment. Pittman appeals those adverse judgments against her.

2. Pittman's claims

Pittman concedes that the claims of the Pittman Estate are subject to subrogation because the Pittman Estate received Occupational Benefits Plan death benefits from MHHS. Moreover, as the Pittman Estate's personal representative, Carol Pittman admits she accepted Occupational Benefits Plan death benefits, but did so only on behalf of her deceased husband and not on her own behalf as his wife. As such, Pittman

contends that her claims as an individual are not subject to subrogation because she as an individual did not receive Occupational Benefits Plan death benefits, nor did she as an individual contractually assign her claims to MHHS by executing an Acknowledgment of Receipt of Benefits, Subrogation Rights and Confidentiality Agreement.

The Administrative Committee read the Occupational Benefits Plan language to mean that Pittman, upon receipt of Occupational Benefits Plan death benefits, subrogated all of her rights, in whatever capacity, to MHHS. We conclude that this interpretation amounts to an abuse of discretion because the Administrative Committee, in reaching its conclusion, ignored the plain language of the Occupational Benefits Plan.

Article 11.1 of the Occupational Benefits Plan states that "in the event of any Benefit payments made under the Plan to or on behalf of any Employee, the Plan shall, to the extent of such payments, be subrogated to all the rights of recovery . . . of the Employee." Article 11.1 further states that by participating in the Occupational Benefits Plan, an employee also obligates the legal representative of his estate and that "the Plan shall be fully subrogated to any recovery or right of recovery that the estate may have against any third party." The quoted language plainly means that when an employee or his estate accepts Occupational Benefits Plan benefits, the employee or his estate must surrender to MHHS all of its rights against third parties.

As applied to the instant case, the Occupational Benefits Plan language means only that the Pittman Estate, via Pittman as the estate representative, must

surrender its claims to MHHS. The language does not mean that Pittman must surrender the wrongful death claims she independently possesses as John Pittman, Jr.'s wife merely because she also served as the representative of the Pittman Estate. Because Pittman took Occupational Benefits Plan death benefits as the Pittman Estate representative - and not in her individual capacity - she cannot be made to subrogate to MHHS the wrongful death claims she independently possesses in her individual capacity as the decedent's wife. In other words, MHHS acquired no subrogation rights nor control of any of Pittman's individual claims. Accordingly, we reverse the judgment of the district court insofar as it granted MHHS' motion for summary judgment with respect to Pittman in her individual capacity, and remand the case to the district court for proceedings not inconsistent with this opinion.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED in part and REVERSED and REMANDED in part.

NO. H-02-3689

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARLES ATTEBERRY SR. AND JUDY ATTEBERRY INDIVIDUALLY AND AS CO-ADMINISTRATORS OF THE ESTATE OF CHARLES ATTEBERRY, JR., ET AL.

VS.

EUROCOPTER DEUTSCHLAND, GMBH; EUROCOPTER, S.A.; AND HONEYWELL INTERNATIONAL, INC.

Filed 5/19/2004

AMENDED FINAL JUDGMENT

Be it remembered that prior to the trial herein the parties announced to the court that all claims herein have been resolved by Orders of the Court and settlement agreements, so that Trial is not necessary. Accordingly, Judgment is entered herein as follows:

1. Plaintiff Carol Ann Pittman's Claim. A dispute exists between Plaintiff Carol Ann Pittman, Individually and as Independent Executrix of the Estate of John Lynwood Pittman, Jr. (Plaintiffs) and Memorial Hermann Healthcare System and Memorial Hermann Hospital System (collectively, MHHS), American Motorists Insurance Company (AMIC) and Kemper Insurance Company (Kemper) as to who

controls the Plaintiffs' claims. MHHS claims that it controls the Plaintiffs' claims pursuant to the provisions of its EFISA Plan under which the Estate of John Lynwood Pittman, Jr. received payments as a result of the death of John Lynwood Pittman, Jr. On November 21, 2003 an Order was entered on the Motions for Summary Judgment filed by MHHS, granting to MHHS the "exclusive and sole authority to direct Prosecution of Carol Ann Pittman's claims." Docket No. 163. AMIC and Kemper claim subrogation rights to portions of Carol Pittman's claims. MHHS and Defendants have entered into a settlement of the Carol Peterson Pittman claims conditioned upon the presentment of a release executed by Carol Peterson Pittman or a final judgment in MHHS' favor giving it the "authority to settle the claims of Carol Peterson Pittman and the estate of John Linwood Pittman, Jr.," and a proper resolution of the subrogation claims of AMIC and Kemper.

2. Claims of John Linwood Pittman, III and Jennifer Pittman (Pittman Children). A similar dispute exists between MHHS and the Pittman Children as to who controls the Plaintiffs' claims. On November 21, 2003 an order was entered based on the Motions for Summary Judgment filed by the Pittman Children and MHHS, holding that MHHS has no right to control or direct the Pittman Children's claims. Docket No. 164. The Pittman Children and Defendants have entered into a settlement agreement conditioned upon the presentation of either a final judgment in favor of the Pittman Children disallowing MHHS' "claimed subrogation rights under the terms of the MHHS ERISA Plan" or a Mutual Release of Claims between MHHS and the Pittman Children.

3. The Claims of MHHS. MHHS and Defendants have settled all claims brought by MHHS on its own behalf.

4. The Claims of Associated Aviation Underwriters (AAU). AAU and Defendants have settled.

5. Claims of Ben Ethridge (Ethridge). A similar dispute exists between MHHS and the Ben Ethridge as to who controls the Plaintiffs' claims. On the 2nd day of March, 2004, an Order was entered based on the Motion for Summary Judgment filed by MHHS, holding that MHHS has no right to control or direct the Ethridge claims. Docket No. 200. Ethridge and Defendants have entered into a settlement agreement conditioned upon presentation of either a final judgment in favor of Ben Ethridge disallowing MHHS' "claimed subrogation rights under the terms of the MHHS ERISA Plan" or a written waiver executed by MHHS waiving all claims it has to subrogation and/or control as to the claims of Ben Ethridge.

6. The Claims of Charles Atteberry Sr. and Judy Atteberry (Atteberry). A dispute exists between Plaintiffs Charles Atteberry Sr. and Judy Atteberry, Individually and as CoAdministrators of the Estate of Charles Atteberry, Jr. (Plaintiffs) and Memorial Hermann Healthcare System and Memorial Hermann Hospital System (collectively, MHHS) as to who controls the Plaintiffs' claims. MHHS claims that it controls the Plaintiffs' claims pursuant to the provisions of its ERISA Plan and the acknowledgment of receipt of benefits, subrogation rights, and confidentiality agreement under which Plaintiffs received payments

for the death of Charles Atteberry. On the 27th day of February, 2004, an Order was entered, based upon a Motion for Summary Judgment filed by MHHS, granting MHHS the exclusive and sole authority to direct prosecution of the Atteberry claims. Docket No. 198. MHHS and Defendants have entered into a settlement agreement of the Atteberry claims conditioned upon the presentment of a release executed by Charles Atteberry Sr. and Judy Atteberry or a final judgment in MHHS' favor giving it the "authority to settle the claims of Charles Atteberry Sr. and Judy Atteberry and the estate of Charles Atteberry."

7. The Claims of the Estates (Silvia Lynn Ethridge, John Pittman, Jr., and Charles Atteberry, Jr. (Estate Claims). A dispute exists between MHHS and each Estate as to who controls each claim. Orders were entered based on Motions for Summary Judgment filed by MHHS holding that MHHS has the right to control each Estate claim. Docket Nos. 163,198 and 200. MHHS and Defendants have settled all of the estate claims conditioned upon the consent of legal representatives of each estate, or a Final Judgment giving MHHS the right to control each claim.

All claims are resolved by Orders and settlements.

Now, therefore, it is ORDERED, ADJUDGED AND DECREED:

1. That Memorial Herman Healthcare System and Memorial Hermann Hospital System (collectively, MHHS) has the right of subrogation and authority to prosecute and settle the claims of Carol Ann Pittman and the Estate of John Pittman, Jr.;

2. MHHS has the right of subrogation and authority to prosecute and settle the claims of Charles Atteberry, Sr., Judy Atteberry and the Estate of Charles Atteberry, Jr.;

3. MHHS has the right of subrogation and authority to prosecute, settle, release and/or dismiss the claims of the Estate of Silvia Lynn Ethridge;

4. MHHS does not have authority to prosecute, settle or dismiss the claims of Ben Ethridge, John Pittman, Jr. or Jennifer Pittman;

5. All relief not granted herein, or in the Court's prior orders, is denied.

NO. H-02-3689

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHARLES ATTEBERRY SR. AND JUDY ATTEBERRY INDIVIDUALLY AND AS CO-ADMINISTRATORS OF THE ESTATE OF CHARLES ATTEBERRY, JR., ET AL.

VS.

EUROCOPTER DEUTSCHLAND, GMBH; EUROCOPTER, S.A.; AND HONEYWELL INTERNATIONAL, INC.

Filed 3/7/2004

FINAL JUDGMENT

Be it remembered that prior to the trial herein the parties announced to the court that all claims herein have been resolved by Orders of the Court and settlement agreements, so that Trial is not necessary. Accordingly, Judgment is entered herein as follows:

1. Plaintiff Carol Ann Pittman's Claim. A dispute exists between Plaintiff Carol Ann Pittman, Individually and as Independent Executrix of the Estate of John Lynwood Pittman, Jr. (Plaintiffs) and Memorial Hermann Hospital Systems (MHHS), American Motorists Insurance Company (AMIC) and Kemper Insurance Company (Kemper) as to who controls the Plaintiffs' claims. MHHS claims that it

controls the Plaintiffs' claims pursuant to the provisions of its ERISA Plan under which the Estate of John Lynwood Pittman, Jr. received payments as a result of the death of John Lynwood Pittman, Jr. On November 21, 2003 an Order was entered on the Motions for Summary Judgment filed by MHHS, granting to MHHS the "exclusive and sole authority to direct Prosecution of Carol Ann Pittman's claims." Docket No. 163. AMIC and Kemper claim subrogation rights to portions of Carol Pittman's claims. MHHS and Defendants have entered into a settlement of the Carol Peterson Pittman claims conditioned upon the presentment of a release executed by Carol Peterson Pittman or a final judgment in MHHS' favor giving it the "authority to settle the claims of Carol Peterson Pittman and the estate of John Linwood Pittman, Jr.," and a proper resolution of the subrogation claims of AMIC and Kemper.

2. Claims of John Linwood Pittman, III and Jennifer Pittman (Pittman Children). A similar dispute exists between MHHS and the Pittman Children as to who controls the Plaintiffs' claims. On November 21, 2003 an order was entered based on the Motions for Summary Judgment filed by the Pittman Children and MHHS, holding that MHHS has no right to control or direct the Pittman Children's claims. Docket No. 164. The Pittman Children and Defendants have entered into a settlement agreement conditioned upon the presentation of either a final judgment in favor of the Pittman Children disallowing MHHS' "claimed subrogation rights under the terms of the MHHS ERISA Plan" or a Mutual Release of Claims between MHHS and the Pittman Children.

3. The Claims of MHHS. MHHS and Defendants

have settled all claims brought by MHHS on its own behalf.

4. The Claims of Associated Aviation Underwriters (AAU). AAU and Defendants have settled.

5. Claims of Ben Ethridge (Ethridge). A similar dispute exists between MHHS and the Ben Ethridge as to who controls the Plaintiffs' claims. On the 2nd day of March, 2004, an Order was entered based on the Motion for Summary Judgment filed by MHHS, holding that MHHS has no right to control or direct the Ethridge claims, Docket No. 200. Ethridge and Defendants have entered into a settlement agreement conditioned upon presentation of either a final judgment in favor of Ben Ethridge disallowing MHHS' "claimed subrogation rights under the terms of the MHHS ERISA Plan" or a written waiver executed by MHHS waiving all claims it has to subrogation and/or control as to the claims of Ben Ethridge.

6. The Claims of Charles Atteberry Sr. and Judy Atteberry (Atteberry). A dispute exists between Plaintiffs Charles Atteberry Sr. and Judy Atteberry, Individually and as CoAdministrators of the Estate of Charles Atteberry, Jr. (Plaintiffs) and Memorial Hermann Hospital Systems as to who controls the Plaintiffs' claims. MHHS claims that it controls the Plaintiffs' claims pursuant to the provisions of its ERISA Plan and the acknowledgment of receipt of benefits, subrogation rights, and confidentiality agreement under which Plaintiffs received payments for the death of Charles Atteberry. On the 27th day of February, 2004, an Order was entered, based upon a Motion for Summary Judgment fled by MHHS,

granting MHHS the exclusive and sole authority to direct prosecution of the Atteberry claims. Docket No. 198. MHHS and Defendants have entered into a settlement agreement of the Atteberry claims conditioned upon the presentment of a release executed by Charles Atteberry Sr. and Judy Atteberry or a final judgment in MHHS' favor giving it the "authority to settle the claims of Charles Atteberry Sr. and Judy Atteberry and the estate of Charles Atteberry."

7. The Claims of the Estates (Silvia Lynn Ethridge, John Pittman, Jr., and Charles Atteberry, Jr. (Estate Claims), A dispute exists between MHHS and each Estate as to who controls each claim. Orders were entered based on Motions for Summary Judgment filed by MHHS holding that MHHS has the right to control each Estate claim. Docket Nos. 163,198 and 200. MHHS and Defendants have settled all of the estate claims conditioned upon the consent of legal representatives of each estate, or a Final Judgment giving MHHS the right to control each claim. All claims are resolved by Orders and settlements. Now, therefore, it is

ORDERED, ADJUDGED AND DECREED:

1. That Memorial Hermann Hospital System has the right of subrogation and authority to prosecute and settle the claims of Carol Ann Pittman and the Estate of John Pittman, Jr.;

2. Memorial Hermann Hospital System has the right of subrogation and authority to prosecute and settle the claims of Charles Atteberry, Sr., Judy Atteberry and the Estate of Charles Atteberry, Jr.;

3. Memorial Hermann Hospital System has the right of subrogation and authority to prosecute, settle, release and/or dismiss the claims of the Estate of Silvia Lynn Ethridge;

4. Memorial Hermann Hospital System does not have authority to prosecute, settle or dismiss the claims of Ben Ethridge, John Pittman, Jr. or Jennifer Pittman;

5. All relief not granted herein, or in the Court's prior orders, is denied.

The Honorable Vanessa D. Gilmore

No. 04-20349
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES ATTEBERRY SR, ET AL,
Plaintiffs

v.

MEMORIAL-HERMANN HEALTHCARE SYSTEMS, On Behalf and for the Benefit of The Estates, Heirs, Devisees, Legatees, Spouses, Children and/or Parents of Charles Atteberry Jr.,
Plaintiffs – Appellees

v.

MEMORIAL-HERMANN HEALTHCARE SYSTEM; MEMORIAL-HERMANN HOSPITAL SYSTEM,
Plaintiffs - Appellants - Appellees

v.

BEN ETHRIDGE,
Intervenor - Plaintiff-Appellee

v.

DALINDA SHELTON; CAROL ANN PITTMAN, also known as Carol Ann Peterson, Independent Executrix of the Estate of John Linwood Pittman, Jr., Deceased and Individually as Beneficiary of John Linwood Pittman, Jr.,
Intervenor - Plaintiffs - Appellants

v.

EUROCOPTER DEUTSCHLAND, GMBH, ET AL,
Defendants

Filed 5/3/2005

Appeals from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARINGT EN BANC

Before GARWOOD, BENAVIDES, and STEWART, Circuit Judges. PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

Judge Jones and Judge Clement did not participate in the consideration of the rehearing en banc.

29 USCA§ 1001, Congressional findings and declaration of policy (a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans are carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to

the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal

taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

REORGANIZATION PLANS
REORGANIZATION PLAN NO. 4 OF 1978
<43 F.R. 47713, 92 Stat. 3790>

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, August 10, 1978, pursuant to the provisions of Chapter 9 of Title 5 of the United States Code. [FN 1]

[FN1] As amended September 20, 1978.

EMPLOYEE RETIREMENT INCOME SECURITY ACT TRANSFERS

Section 101. Transfer to the Secretary of the Treasury. Except as otherwise provided in Sections 104 and 106 of this Plan, all authority of the Secretary of Labor to issue the following described documents pursuant to the statutes hereinafter specified its hereby transferred to the Secretary of the Treasury:

(a) regulations, rulings, opinions, variances and waivers under Parts 2 [section 1051 et seq. of this title] and 3 [section 1081 et seq. of this title] of Subtitle B of Title I and subsection 1012(c) [set out as a note under section 411 of Title 26] of Title II of the Employee Retirement

Income Security Act of 1974 (29 U.S.C. 1001 note) (hereinafter referred to as "ERISA"),

EXCEPT for sections and subsections 201, 203(a)(3)(B), 209, and 301(a) of ERISA [sections 1051, 1053(a)(3)(B),1059, and 1081(a) of this title];

(b) such regulations, rulings, and opinions which are granted to the Secretary of Labor under Sections 404, 410, 411, 412 and 413 of the Internal Revenue Code of 1954, as amended [sections 404, 410, 411, 412, and 413 of Title 26], (hereinafter referred to as the "Code"),

EXCEPT for subsection 411(a)(3)(B) of the Code [section 411(a)(3)(B) of Title 26] and the definitions of "collectively bargained plan" and "collective bargaining agreement" contained in subsections 404(a)(1)(B) and (a)(1)(C), 410(b)(2)(A) and (b)(2)(B), and 413(a)(1) of the Code [sections 404(a)(1)(B), (a)(1)(C), 410(b)(2)(A) and (b)(2)(B), and 413(a)(1) of Title 26]; and

(c) regulations, rulings, and opinions under subsections 3(19), 3(22), 3(23), 3(24), 3(25), 3(27), 3(28), 3(29), 3(30), and 3(31) of Subtitle A of Title I of ERISA [sections 1002(19), (22), (23), (24), (25), (27), (28), (29), (30), and (31) of this title].

Section 102. Transfers to the Secretary of Labor.

Except as otherwise provided in Section 105 of this Plan, all authority of the Secretary of the Treasury to issue the following described documents pursuant to the statutes hereinafter specified is hereby transferred to the Secretary of Labor:
(a) regulations, rulings, opinions, and exemptions under

section 4975 of the Code [section 4975 of Title 26], EXCEPT for (i) subsections 4975(a), (b), (c)(3), (d)(3), (e)(1), and (e)(7) of the Code [section 4975(a), (b), (c)(3), (d)(3), (e)(1), and (e)(7) of Title 26]; (ii) to the extent necessary for the continued enforcement of subsections 4975(a) and (b) [section 4975(a) and (b) of Title 26] by the Secretary of the Treasury, subsections 4975(f)(1), (f)(2), (f)(4), (f)(5) and (f)(6) of the Code [section 4975(f)(1), (f)(2), (f)(4), (f)(5), and (f)(6) of Title 26]; and (iii) exemptions with respect to transactions that are exempted by subsection 404(c) of ERISA [section 1104(c) of this title] from the provisions of Part 4 of Subtitle B of Title I of ERISA [section 1101 et seq. of this Title]; and

(b) regulations, rulings, and opinions under subsection 2003(c) of ERISA [set out as a note under section 4975 of Title 26],

EXCEPT for subsection 2003(c)(1)(B) [set out in the note under section 4975 of Title 26],

Section 103. Coordination Concerning Certain Fiduciary Actions.

In the case of fiduciary actions which are subject to Part 4 of Subtitle B of Title I of ERISA [section 1101 et seq. of this title], the Secretary of the Treasury shall notify the Secretary of Labor prior to the time of commencing any proceeding to determine whether the action violates the exclusive benefit rule of subsection 401(a) of the Code [section 401 (a) of Title 26], but not later than prior to issuing a preliminary notice of intent to disqualify under that rule, and the Secretary of the Treasury shall not issue a determination that a plan or

trust does not satisfy the requirements of subsection 401(a) by reason of the exclusive benefit rule of subsection 401(a), unless within 90 days after the date on which the Secretary of the Treasury notifies the Secretary of Labor of pending action, the Secretary of Labor certifies that he has no objection to the disqualification or the Secretary of Labor fails to respond to the Secretary of the Treasury. The requirements of this paragraph do not apply in the case of any termination or jeopardy assessment under sections 6851 or 6861 of the Code [section 6851 or 6861 of Title 26] that has been approved in advance by the Commissioner of Internal Revenue, or, as delegated, the Assistant Commissioner for Employee Plans and Exempt Organizations.

Section 104. Enforcement by the Secretary of Labor.

The transfers provided for in Section 101 of this Plan shall not affect the ability of the Secretary of Labor, subject to the provisions of Title III of ERISA [section 1201 et seq. of this title] relating to jurisdiction, administration, and enforcement, to engage in enforcement under Section 502 of ERISA [section 1132 of this title] or to exercise the authority set forth under Title III of ERISA [section 1201 et seq. of this title], including the ability to make interpretations necessary to engage in such enforcement or to exercise such authority. However, in bringing such actions and in exercising such authority with respect to Parts 2 [section 1051 et seq. of this title] and 3 [section 1081 et seq. of this title] of Subtitle B of Title I of ERISA and any definitions for which the authority of the Secretary of Labor is transferred to the Secretary of the Treasury as provided in Section 101 of this Plan, the Secretary of

Labor shall be bound by the regulations, rulings, opinions, variances, and waivers issued by the Secretary of the Treasury.

Section 105. Enforcement by the Secretary of the Treasury.

The transfers provided for in Section 102 of this Plan shall not affect the ability of the Secretary of the Treasury, subject to the provisions of Title III of ERISA [section 1201 et seq. of this title] relating to jurisdiction, administration, and enforcement, (a) to audit plans and employers and to enforce the excise tax provisions of subsections 4975(a) and 4975(b) of the Code [section 4975(a) and (b) of Title 26], to exercise the authority set forth in subsections 502(b)(1) and 502(h) of ERISA [section 1132(b)(1) and (h) of this title], or to exercise the authority set forth in Title III of ERISA [section 1201 et seq. of this title], including the ability to make interpretations necessary to audit, to enforce such taxes, and to exercise such authority; and (b) consistent with the coordination requirements under Section 103 of this Plan, to disqualify, under section 401 of the Code [section 401 of Title 26], a plan subject to Part 4 of Subtitle B of Title I of ERISA [section 1101 et seq. of this title], including the ability to make the interpretations necessary to make such disqualification. However, in enforcing such excise taxes and, to the extent applicable, in disqualifying such plans the Secretary of the Treasury shall be bound by the regulations, rulings, opinions, and exemptions issued by the Secretary of Labor pursuant to the authority transferred to the Secretary of Labor as provided in Section 102 of this Plan.

Section 106. Coordination for Section 101 Transfers.

(a) The Secretary of the Treasury shall not exercise the functions transferred pursuant to Section 101 of this Plan to issue in proposed or final form any of the documents described in subsection (b) of this Section in any case in which such documents would significantly impact on or substantially affect collectively bargained plans unless, within 100 calendar days after the Secretary of the Treasury notifies the Secretary of Labor of such proposed action, the Secretary of Labor certifies that he has no objection or he fails to respond to the Secretary of the Treasury. The fact of such a notification, except for such notification for documents described in subsection (b)(iv) of this Section, from the Secretary of the Treasury to the Secretary of Labor shall be announced by the Secretary of Labor to the public within ten days following the date of receipt of the notification by the Secretary of Labor.

(b) The documents to which this Section applies are:

(i) amendments to regulations issued pursuant to subsections 202(a)(3), 203(b)(2) and (3)(A), 204(b)(3)(A), (C), and (E), and 210(a)(2) of ERISA [sections 1052(a)(3), 1053(b)(2) and (3)(A), 1054(b)(3)(A), (C), and (E), and 1060(a)(2) of this title], and subsections 410(a)(3) and 411(a)(5), (6)(A), and (b)(3)(A), (C), and (E), 413(b)(4) and (c)(3) and 414(f) of the Code [sections 410(a)(3), 411(a)(5), (6)(A), and (b)(3)(A), (C), and (E), 413(b)(4) and (c)(3), and 414(f) of Title 26];

(ii) regulations issued pursuant to subsections 204(b)(3)(D), 302(c)(8), and 304(a) and (b)(2)(A) of ERISA [sections 1054(b)(3)(D), 1082(c)(8), and 1084(a)

and (b)(2)(A) of this title], and subsections 411(b)(3)(D), 412(c)(8), (e), and (f)(2)(A) of the Code [sections 411(b)(3)(D), 412(c)(8), (e), and (f)(2)(A) of Title 26]; and

(iii) revenue rulings (within the meaning of 26 CFR Section 601.201(a)(6)), revenue procedures, and similar publications, if the rulings, procedures and publications are issued under one of the statutory provisions listed in (i) and (ii) of this subsection; and

(iv) rulings (within the meaning of 26 CFR Section 601.201(a)(2)) issued prior to the issuance of a published regulation under one of the statutory provisions listed in (1) and (ii) of this subsection and not issued under a published Revenue Ruling.

(c) For those documents described in subsections (b)(i), (b)(ii) and (b)(iii) of this Section, the Secretary of Labor may request the Secretary of the Treasury to initiate the actions described in this Section 106 of this Plan.

Section 107. Evaluation.

On or before January 31, 1980, the President will submit to both Houses of the Congress an evaluation of the extent to which this Reorganization Plan has alleviated the problems associated with the present administrative structure under ERISA, accompanied by specific legislative recommendations for a long-term administrative structure under ERISA.

Section 108. Incidental Transfers.

So much of the personnel, property, records, and unexpended balances of appropriations, allocations and

other funds employed, used, held, available, or to be made available in connection with the functions transferred under this Plan, as the Director of the Office of Management and Budget shall determine, shall be transferred to the appropriate agency, or component at such time or times as the Director of the Office of Management and Budget shall provide, except that no such unexpended balances transferred shall be used for purposes other than those for which the appropriation was originally made. The Director of the Office of Management and Budget shall provide for terminating the affairs of any agencies abolished herein and for such further measures and dispositions as such Director deems necessary to effectuate the purposes of this Reorganization Plan.

Section 109. Effective Date.

The provisions of this Reorganization Plan shall become effective at such time or times, on or before April 30, 1979, as the President shall specify, but not sooner than the earliest time allowable under Section 906 of Title 5, United States Code [section 906 of Title 5].

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 12071

Ex. Ord. No. 12071, July 12, 1978, 43 F.R. 30259, which established the President's Commission on Pension Policy and provided for its membership, functions, etc., was revoked by Ex. Ord. No. 12379, § 1, Aug. 17, 1982, 47 F.R. 36099, set out as a note under section 14 of the Federal Advisory Committee Act in Appendix 2 to Title 5, Government Organization and Employees.

EXECUTIVE ORDER NO. 12108

<Dec. 28, 278, 44 F.R> 1065>

EFFECTIVE DATE OF ERISA TRANSFERS

By the authority vested in me as President of the United States of America by Section 109 of Reorganization Plan No. 4 of 1978 (43 FR 47713) [set out as a note above], it is hereby ordered that the provisions of Reorganization Plan No. 4 of 1978 shall be effective on Sunday, December 31, 1978.

JIMMY CARTER

EXECUTIVE ORDER NO. 12262

Ex. Ord. No. 12262, Jan. 7, 1981, 46 F.R. 2313, which established the Interagency Employee Benefit Council and provided for its membership, functions, etc., was revoked by Ex. Ord. No. 12379, § 9, Aug. 17, 1982, 47 F.R. 36099, set out as a note under section 14 of the Federal Advisory Committee Act in Appendix 2 to Title 5, Government Organization and Employees.

MESSAGE OF THE PRESIDENT

To the Congress of the United States: Today I am submitting to the Congress my fourth Reorganization Plan for 1978. This proposal is designed to simplify and improve the unnecessarily complex administrative requirements of the Employee Retirement Income Security Act of 1974 (ERISA) [See Short Title of 1974 Acts note set out under this section.]. The new plan will eliminate overlap and duplication in the administration

of ERISA and help us achieve our goal of well regulated private pension plans.

ERISA was an essential step in the protection of worker pension rights. Its administrative provisions, however, have resulted in bureaucratic confusion and have been justifiably criticized by employers and unions alike. The biggest problem has been overlapping jurisdictional authority. Under current ERISA provisions, the Departments of Treasury and Labor both have authority to issue regulations and decisions.

This dual jurisdiction has delayed a good many important rulings and, more importantly, produced bureaucratic runarounds and burdensome reporting requirements.

The new plan will significantly reduce these problems. In addition, both Departments are trying to cut red tape and paperwork, to eliminate unnecessary reporting requirements, and to streamline forms wherever possible.

Both Departments have already made considerable progress, and both will continue the effort to simplify their rules and their forms.

The Reorganization Plan is the most significant result of their joint effort to modify and simplify ERISA. It will eliminate most of the jurisdictional overlap between Treasury and Labor by making the following changes:

1) Treasury will have statutory authority for minimum standards. The new plan puts all responsibility for

funding, participation, and vesting of benefit rights in the Department of Treasury. These standards are necessary to ensure that employee benefit plans are adequately funded and that all beneficiary rights are protected. Treasury is the most appropriate Department to administer these provisions; however, Labor will continue to have veto power over Treasury decisions that significantly affect collectively bargained plans.

2) Labor will have statutory authority for fiduciary obligations. ERISA prohibits transactions in which self-interest or conflict of interest could occur, but allows certain exemptions from these prohibitions. Labor will be responsible for overseeing fiduciary conduct under these provisions.

3) Both Departments will retain enforcement powers. The Reorganization Plan will continue Treasury's authority to audit plans and levy tax penalties for any deviation from standards. The plan will also continue Labor's authority to bring civil action against plans and fiduciaries. These provisions are retained in order to keep the special expertise of each Department available. New coordination between the Departments will eliminate duplicative investigations of alleged violations.

This reorganization will make an immediate improvement in ERISA's administration. It will eliminate almost all of the dual and overlapping authority in the two departments and dramatically cut the time required to process applications for exemptions from prohibited transactions.

This plan is an interim arrangement. After the Departments have had a chance to administer ERISA under this new plan, the Office of Management and Budget and the Departments will jointly evaluate that experience. Based on that evaluation, early in 1980, the Administration will make appropriate legislative proposals to establish a long-term administrative structure for ERISA.

Each provision in this reorganization will accomplish one or more of the purposes in Title 5 of U.S.C. 901(a). There will be no change in expenditure or personnel levels, although a small number of people will be transferred from the Department of Treasury to the Department of Labor.

We all recognize that the administration of ERISA has been unduly burdensome. I am confident that this reorganization will significantly relieve much of that burden.

This plan is the culmination of our effort to streamline ERISA. It provides an administrative arrangement that will work.

ERISA has been a symbol of unnecessarily complex government regulation. I hope this new step will become equally symbolic of my Administration's commitment to making government more effective and less intrusive in the lives of our people.

JIMMY CARTER

The White House,
August 10, 1978.

Current through P.L. 109-34, approved 07-12-05

29 U.S.C.A.§ 1001b. Findings and declaration of policy

(a) Findings

The Congress finds that-

(1) single-employer defined benefit pension plans have a substantial impact on interstate commerce and are affected with a national interest;

(2) the continued well-being and retirement income security of millions of workers, retirees, and their dependents are directly affected by such plans;

(3) the existence of a sound termination insurance system is fundamental to the retirement income security of participants and beneficiaries of such plans; and

(4) the current termination insurance system in some instances encourages employers to terminate pension plans, evade their obligations to pay benefits, and shift unfunded pension liabilities onto the termination insurance system and the other premium-payers.

(b) Additional findings

The Congress further finds that modification of the current termination insurance system and an increase in the insurance premium for single-employer defined benefit pension plans-

(1) is desirable to increase the likelihood that full

benefits will be paid to participants and beneficiaries of such plans;

(2) is desirable to provide for the transfer of liabilities to the termination insurance system only in cases of severe hardship;

(3) is necessary to maintain the premium costs of such system at a reasonable level; and

(4) is necessary to finance properly current funding deficiencies and future obligations of the single-employer pension plan termination insurance system.

(c) Declaration of policy

It is hereby declared to be the policy of this title-

(1) to foster and facilitate interstate commerce;

(2) to encourage the maintenance and growth of single-employer defined benefit pension plans;

(3) to increase the likelihood that participants and beneficiaries under single-employer defined benefit pension plans will receive their full benefits;

(4) to provide for the transfer of unfunded pension liabilities onto the single-employer pension plan termination insurance system only in cases of severe hardship;

(5) to maintain the premium costs of such system at a reasonable level; and

(6) to assure the prudent financing of current funding

deficiencies and future obligations of the single-employer pension plan termination insurance system by increasing termination insurance premiums.

CREDIT(S) (Pub.L. 99-272, Title XI, § 11002, Apr. 7,1986,100 Stat. 237.) HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1986 Acts. Senate Report No. 99-146 and House Report Nos. 99-241(Parts I-III) and 99-300, see 1986 U.S. Code Cong. and Adm. News, p. 42.

References in Text

This title, referred to in subsec. (c), is Title XI of Pub.L. 99-272, Apr. 7, 1986, 100 Stat. 237, known as the Single-Employer Pension Plan Amendments Act of 1986. For complete classification of Title XI of Pub.L. 99-272 to the Code, see Short Title of 1986 Amendments note set out under section 1001 of this title and Tables.

Codifications

Section was enacted as part of the Single-Employer Pension Plan Amendments Act of 1986, and not as part of the Employee Retirement Income Security Act of 1974, which comprises this chapter.

Effective and Applicability Provisions

1986 Acts. Section effective, with certain exceptions, Jan. 1, 1986, see section 11019 of Pub.L. 99-272, set out as a note under section 1341 of this title.

29 USCA § 1102. Establishment of plan

(a) Named fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan

Every employee benefit plan shall-

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

(3) provide a procedure for amending such plan, and for

identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan. (c) Optional features of plan

Any employee benefit plan may provide-

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c)(1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan,

Current through P.L. 109-34, approved 07-12-05

29 USCA Sec. 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or

maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under

which

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement, shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

(4) The term "employee organization" means any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to emplcyment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan.

(5) The term "employer" means any person acting

directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(10) The term "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone. The term "United States" when used in the geographic sense means the States and the Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331-1343).

(11) The term "commerce" means trade, traffic, commerce, transportation, or communication between any State and any place outside thereof.

(12) The term "industry or activity affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act, 1947 [29 U.S.C.A. § 141 et seq.], or the Railway Labor Act [45 U.S.C.A. § 151 et seq.]

(13) The term "Secretary" means the Secretary of Labor.

(14) The term "party in interest" means, as to an employee benefit plan-

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of -

(i) the combined voting power of all classes of stock

entitled to vote or the total value of shares of all classes of stock of a corporation. [FN 1]

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of -

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,
is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the

employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (1). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of Title 26 is permitted to make payments under section 1403 of this title shall be treated as a party in interest with respect to such trust.

(15) The term "relative" means a spouse, ancestor, lineal descendant, or spouse of a lineal descendant.

(16)(A) The term "administrator" means-

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

(17) The term "separate account" means an account established or maintained by an insurance company under which income, gains, and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account without regard to other income, gains, or losses of the insurance company.

(18) The term "adequate consideration" when used in part 4 of subtitle B of this subchapter means (A) in the case of a security for which there is a generally recognized market, either (i) the price of the security prevailing on a national securities exchange which is registered under section 78f of Title 15, or (ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the

terms of the plan and in accordance with regulations promulgated by the Secretary.

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title.

(20) The term "security" has the same meaning as such term has under section 77b(1) of Title 15.

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an

investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

(22) The term "normal retirement benefit" means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to-

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a

benefit described in section 1054(b)(1)(G) of this title.

(23) The term "accrued benefit" means-

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under section 1054(c)(2)(B) of this title with respect to the employee's accumulated contribution.

(24) The term "normal retirement age" means the earlier of-

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of

(i) the time a plan participant attains age 65, or
(ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

(25) The term "vested liabilities" means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable.

(26) The term "current value" means fair market value where available and otherwise the fair value as determined in good faith by a trustee or a named fiduciary (as defined in section 1102(a)(2) of this title) pursuant to the terms of the plan and in accordance with regulations of the Secretary, assuming an orderly liquidation at the time of such determination.

(27) The term "present value'", with respect to a liability, means the value adjusted to reflect anticipated events. Such adjustments shall conform to such regulations as the Secretary of the Treasury may prescribe.

(28) The term "normal service cost" or "normal cost" means the annual cost of future pension benefits and administrative expenses assigned, under an actuarial cost method, to years subsequent to a particular valuation date of a pension plan. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(29) The term "accrued liability" means the excess of the present value, as of a particular valuation date of a pension plan, of the projected future benefit costs and administrative expenses for all plan participants and beneficiaries over the present value of future contributions for the normal cost of all applicable plan participants and beneficiaries. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(30) The term "unfunded accrued liability" means the excess of the accrued liability, under an actuarial cost method which so provides, over the present value of the

assets of a pension plan. The Secretary of the Treasury may prescribe regulations to carry out this paragraph.

(31) The term "advance funding actuarial cost method" or "actuarial cost method" means a recognized actuarial technique utilized for establishing the amount and incidence of the annual actuarial cost of pension plan benefits and expenses. Acceptable actuarial cost methods shall include the accrued benefit cost method (unit credit method), the entry age normal cost method, the individual level premium cost method, the aggregate cost method, the attained age normal cost method, and the frozen initial liability cost method. The terminal funding cost method and the current funding (pay-as-you-go) cost method are not acceptable actuarial cost methods. The Secretary of the Treasury shall issue regulations to further define acceptable actuarial cost methods.

(32) The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935, or 1937 [45 U.S.C.A. § 231 et seq.] applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act [22 U.S.C.A. § 288 et seq.].

(33)(A) The term "church plan" means a plan established and maintained (to the extent required in clause (ii) of

subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26.

(B) The term "church plan" does not include a plan-

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of Title 26), or

(ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph-

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(ii) The term employee of a church or a convention or association of churches includes-

(I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches; and

(III) an individual described in clause (v).

(iii) A church or a convention or association of churches which is exempt from tax under section 501 of Title 26 shall be deemed the employer of any individual included as an employee under clause (ii).

(iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(v) If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches, the church plan shall not fail to meet the requirements of this paragraph merely because the plan-

(I) retains the employee's accrued benefit or account for the payment of benefits to the employee or his

beneficiaries pursuant to the terms of the plan; or

(II) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7) of Title 26) at the time of such separation from service.

(D)(i) If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26 fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.

(ii) If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.
(iii) For purposes of this subparagraph, the term "correction period" means-

(I) the period ending 270 days after the date of mailing by the Secretary of the Treasury of a notice of default with respect to the plan's failure to meet one or more of the requirements of this paragraph; or

(II) any period set by a court of competent jurisdiction

after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary of the Treasury on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(III) any additional period which the Secretary of the Treasury determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

(35) The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant--

(A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and

(B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based

upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan.

(36) The term "excess benefit plan" means a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of Title 26 on plans to which that section applies without regard to whether the plan is funded. To the extent that a separable part of a plan (as determined by the Secretary of Labor) maintained by an employer is maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan.

(37)(A) The term "multiemployer plan" means a plan-

(i) to which more than one employer is required to contribute,

(ii) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(iii) which satisfies such other requirements as the Secretary may prescribe by regulation.

(B) For purposes of this paragraph, all trades or businesses (whether or not incorporated) which are under common control within the meaning of section 1301(b)(1) of this title are considered a single employer.

(C) Notwithstanding subparagraph (A), a plan is a

multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding its termination date.

(D) For purposes of this subchapter, notwithstanding the preceding provisions of this paragraph, for any plan year which began before September 26, 1980, the term "multiemployer plan" means a plan described in this paragraph (37) as in effect immediately before such date.

(E) Within one year after September 26, 1980, a multiemployer plan may irrevocably elect, pursuant to procedures established by the corporation and subject to the provisions of sections 1453(b) and (c) of this title, that the plan shall not be treated as a multiemployer plan for all purposes under this chapter or the Internal Revenue Code of 1954 if for each of the last 3 plan years ending prior to the effective date of the Multiemployer Pension Plan Amendments Act of 1980-

(i) the plan was not a multiemployer plan because the plan was not a plan described in subparagraph (A)(iii) of this paragraph and section 414(f)(1)(C) of Title 26 (as such provisions were in effect on the day before September 26,1980); and

(ii) the plan had been identified as a plan that was not a multiemployer plan in substantially all its filings with the corporation, the Secretary of Labor and the Secretary of the Treasury.

(F)(i) For purposes of this subchapter a qualified football coaches plan-

(I) shall be treated as a multiemployer plan to the extent not inconsistent with the purposes of this subparagraph; and

(II) notwithstanding section 401(k)(4)(B) of Title 26, may include a qualified cash and deferred arrangement.

(ii) For purposes of this subparagraph, the term "qualified football coaches plan" means any defined contribution plan which is established and maintained by an organization-

(I) which is described in section 501(c) of Title 26;

(II) the membership of which consists entirely of individuals who primarily coach football as full-time employees of 4-year colleges or universities described in section 170(b)(1)(A)(ii) of Title 26; and

(III) which was in existence on September 18, 1986.

(38) The term "investment manager" means any fiduciary (other than a trustee or named fiduciary, as defined in section 1102(a)(2) of this title)-

(A) who has the power to manage, acquire, or dispose of any asset of a plan;

(B) who (1) is registered as an investment adviser under the Investment Advisers Act of 1940 [15 U.S.C.A. § 80b-1 et seq.]; (ii) is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act [15 U.S.C.A. § 80b-3a(a)], is registered as an investment adviser under the laws of the State (referred to in such

paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary; (iii) is a bank, as defined in that Act; or (iv) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State; and

(C) has acknowledged in writing that he is a fiduciary with respect to the plan.

(39) The terms "plan year" and "fiscal year of the plan" mean, with respect to a plan, the calendar, policy, or fiscal year on which the records of the plan are kept.

(40)(A) The term "multiple employer welfare arrangement" means an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained-

(i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements,

(ii) by a rural electric cooperative, or

(iii) by a rural telephone cooperative association.

(B) For purposes of this paragraph-

(i) two or more trades or businesses, whether or not incorporated, shall be deemed a single employer if such trades or businesses are within the same control group,

(ii) the term "control group" means a group of trades or businesses under common control,

(iii) the determination of whether a trade or business is under "common control" with another trade or business shall be determined under regulations of the Secretary applying principles similar to the principles applied in determining whether employees of two or more trades or businesses are treated as employed by a single employer under section 1301(b) of this title, except that, for purposes of this paragraph, common control shall not be based on an interest of less than 25 percent,

(iv) the term "rural electric cooperative" means-

(I) any organization which is exempt from tax under section 501 (a) of Title 26 and which is engaged primarily in providing electric service on a mutual or cooperative basis, and

(II) any organization described in paragraph (4) or (6) of section 501(c) of Title 26 which is exempt from tax under section 501(a) of Title 26 and at least 80 percent of the members of which are organizations described in subclause (1), and

(v) the term "rural telephone cooperative association"

means an organization described in paragraph (4) or (6) of section 501(c) of Title 26 which is exempt from tax under section 501(a) of Title 26 and at least 80 percent of the members of which are organizations engaged primarily in providing telephone service to rural areas of the United States on a mutual, cooperative, or other basis.

(41) [FN2] Single-employer plan

The term "single-employer plan" means an employee benefit plan other than a multiemployer plan.

(41) [FN2] The term "single employer plan" means a plan which is not a multiemployer plan.

[FN1] So in original. The period probably should be a comma.

[FN2] So in original. Two pars. (41) have been enacted.

Current through P.L. 109-34, approved 07-12-05

V.T.C.A., Civil Practice & Remedies Code § 71.001
Effective: September 01, 2003

VERNON'S TEXAS STATUTES AND CODES ANNOTATED CIVIL PRACTICE AND REMEDIES CODE
TITLE 4. LIABILITY IN TORT
CHAPTER 71. WRONGFUL DEATH; SURVIVAL; INJURIES OCCURRING OUT OF STATE
SUBCHAPTER A. WRONGFUL DEATH

71.001. Definitions

In this subchapter:

(1) "Corporation" means a municipal, private, public, or quasi-public corporation other than a county or a common or independent school district.

(2) "Person" means an individual, association of individuals, joint-stock company, or corporation or a trustee or receiver of an individual, association of individuals, joint-stock company, or corporation.

(3) "Death" includes, for an individual who is an unborn child, the failure to be born alive.

(4) "Individual" includes an unborn child at every stage of gestation from fertilization until birth.

Current through Chapters effective immediately through Ch. 290 of the 2005 Regular Session of the 79th Legislature

V.T.C.A., Civil Practice & Remedies Code § 71.002
Effective: [See Text Amendments]
VERNON'S TEXAS STATUTES AND CODES ANNOTATED CIVIL PRACTICE AND REMEDIES CODE
TITLE 4. LIABILITY IN TORT
CHAPTER 71. WRONGFUL DEATH; SURVIVAL; INJURIES OCCURRING OUT OF STATE
SUBCHAPTER A. WRONGFUL DEATH
§ 71.002. Cause of Action

(a) An action for actual damages arising from an injury that causes an individual's death may be brought if liability exists under this section.

(b) A person is liable for damages arising from an injury that causes an individual's death if the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default.

(c) A person is liable for damages arising from an injury that causes an individual's death if.

(1) the person is a proprietor, owner, charterer, or hirer of an industrial or public utility plant or of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers; and

(2) the injury was caused by the person's or his agent's or servant's wrongful act, neglect, carelessness, unskillfulness, or default.

(d) A person is liable for damages arising from an injury that causes an individual's death if

(1) the person is a receiver, trustee, or other person in charge of or in control of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers, of an industrial or public utility plant, or of other machinery; and

(2) the injury was caused by:

(A) the person's wrongful act, neglect, carelessness,

unskillfulness, or default;

(B) the person's servant's or agent's wrongful act, neglect, carelessness, unfitness, unskillfulness, or default; or

(C) a bad or unsafe condition of the railroad, street railway, or other machinery under the person's control or operation.

(e) A person is liable for damages arising from an injury that causes an individual's death if:

(1) the person is a receiver, trustee, or other person in charge of or in control of a railroad, street railway, steamboat, stagecoach, or other vehicle for the transportation of goods or passengers, of an industrial or public utility plant, or of other machinery; and

(2) the action could have been brought against the owner of the railroad, street railway, or other machinery if he had been acting as operator.

Current through Chapters effective immediately through Ch. 290 of the 2005 Regular Session of the 79th Legislature
V.T.C.A., Civil Practice & Remedies Code § 71.003 C
Effective: September 01, 2003
VERNON'S TEXAS STATUTES AND CODES ANNOTATED CIVIL PRACTICE AND REMEDIES CODE
TITLE 4. LIABILITY IN TORT
CHAPTER 71. WRONGFUL DEATH; SURVIVAL; INJURIES OCCURRING OUT OF STATE
SUBCHAPTER A. WRONGFUL DEATH

§ 71.003. Application; Certain Conduct Excepted

(a) This subchapter applies only if the individual injured would have been entitled to bring an action for the injury if the individual had lived or had been born alive.

(b) This subchapter applies whether the injury occurs inside or outside this state.

(c) This subchapter does not apply to a claim for the death of an individual who is an unborn child that is brought against:

(1) the mother of the unborn child;

(2) a physician or other licensed health care provider, if the death is the intended result of a lawful medical procedure performed by the physician or health care provider with the requisite consent;

(3) a person who dispenses or administers a drug in accordance with law, if the death is the result of the dispensation or administration of the drug; or

(4) a physician or other health care provider licensed in this state, if the death directly or indirectly is caused by, associated with, arises out of, or relates to a lawful medical or health care practice or procedure of the physician or the health care provider.

Current through Chapters effective immediately through Ch. 290 of the 2005 Regular Session of the 79th Legislature

VERNON'S TEXAS STATUTES AND CODES ANNOTATED CIVIL PRACTICE AND REMEDIES CODE
TITLE 4. LIABILITY IN TORT
CHAPTER 71. WRONGFUL DEATH; SURVIVAL; INJURIES OCCURRING OUT OF STATE
SUBCHAPTER A. WRONGFUL DEATH
§ 71.004. Benefitting From and Bringing Action

(a) An action to recover damages as provided by this subchapter is for the exclusive benefit of the surviving spouse, children, and parents of the deceased.

(b) The surviving spouse, children, and parents of the deceased may bring the action or one or more of those individuals may bring the action for the benefit of all.

(c) If none of the individuals entitled to bring an action have begun the action within three calendar months after the death of the injured individual, his executor or administrator shall bring and prosecute the action unless requested not to by all those individuals.

Current through Chapters effective immediately through Ch. 290 of the 2005 Regular Session of the 79th Legislature

VERNON'S TEXAS STATUTES AND CODES ANNOTATED CIVIL PRACTICE AND REMEDIES CODE
TITLE 4. LIABILITY IN TORT
CHAPTER 71. WRONGFUL DEATH; SURVIVAL; INJURIES OCCURRING OUT OF STATE
SUBCHAPTER B. SURVIVAL

§ 71.021. Survival of Cause of Action

(a) A cause of action for personal injury to the health, reputation, or person of an injured person does not abate because of the death of the injured person or because of the death of a person liable for the injury.

(b) A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person. The action survives against the liable person and the person's legal representatives.

(c) The suit may be instituted and prosecuted as if the liable person were alive.

Current through Chapters effective immediately through Ch. 290 of the 2005 Regular Session of the 79th Legislature

(Cite as: 1974 U.S.C.C.A.N. 4639)

P.L. 93-406, EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 House Report (Education and Labor Committee) No. 93-533, Oct. 2, 1973 (To accompany H.R. 2)
House Report (Ways and Means Committee) No. 93-807, Feb. 21, 1974 (To accompany H.R. 12855)
Senate Report (Labor and Public Welfare Committee) No. 93-127, Apr. 18, 1973 (To accompany S. 4)
Senate Report (Finance Committee) No. 93-383, Aug. 21, 1973 (To accompany S. 1179) House Conference Report No. 93-1280, Aug. 12, 1974 (To accompany H.R. 2) Senate Conference Report No. 93-1090, Aug. 13, 1974 (To accompany H.R. 2)

Cong. Record Vol. 120 (1974) DATES OF CONSIDERATION AND PASSAGE House February 28, August 20, 1974 Senate March 4, August 22, 1974

The House and Senate Reports and the House Conference Report are set out. (CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

HOUSE REPORT
NO. 93-533
Oct. 2, 1973

THE Committee on Education and Labor, to whom was referred the bill (H.R. 2) to revise the Welfare and Pension Plans Disclosure Act, having considered the same, report favorably thereon with an amendment and recommend that the bill, as amended, do pass. The amendment substitutes all after the enacting clause and inserts a substitute text which appears in italic type in the reported bill.

I. SYNOPSIS

The Employee Benefit Security Act as reported by the Committee is designed to remedy certain defects in the private retirement system which limit the effectiveness of the system in providing retirement income security. The primary purpose of the bill is the protection of individual pension rights, but the committee has been constrained to recognize the voluntary nature of private retirement plans. The relative improvements required by this Act have been weighed against the

additional burdens to be placed on the system. While modest cost increases are to be anticipated when the Act becomes effective, the adverse impact of these increases have been minimized. Additionally, all of the provisions in the Act have been analyzed on the basis of their projected costs in relation to the anticipated benefit to the employee participant.In broad outline, the bill is designed to:

(1) establish equitable standards of plan administration;

(2) mandate minimum standards of plan design with respect to the vesting of plan benefits;

(3) require minimum standards of fiscal responsibility by requiring the amortization of unfunded liabilities;

(4) insure the vested portion of unfunded liabilities against the risk of premature plan termination; and

(5) promote a renewed expansion of private retirement plans and increase the number of participants receiving private retirement benefits.

Provision is made for the imposition of criminal penalties on those willfully violating their duties under the Act. The Labor Department is given primary authority to administer the provisions of the Act, but the Committee has placed the principal focus of the enforcement effort on anticipated civil litigation to be initiated by the Secretary of Labor as well as participants and beneficiaries.

II. BACKGROUND

The private pension system is a relatively modern economic institution tracing its role as an important social and economic factor only from the mid 1940's. A variety of converging financial and social trends in our society have created a favorable environment for the growth and expansion of private deferred compensation schemes and retirement programs in general. As our economy has matured, an ever increasing number of employers have recognized their responsibility for the physical and economic welfare of their employees, even for the years beyond retirement. Its development parallels and is a response to the transition of the American life style from its rural agrarian antecedents into its present urbanized, wage earner society. The dynamic asset growth necessary to meet its responsibilities has placed the private pension system in a position to influence the level of savings, the operation of our capital markets, and the relative financial security of millions of consumers, three of the fundamental elements of our national economic security.

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A. VESTING

One of the major private pension plan considerations centers around the concept

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C. FIDUCIARY RESPONSIBILITY AND DISCLOSURE

Another area of concern of the Subcommittee has involved the conduct of administration and operations

of pension plans. Of particular interest has been the course of conduct in fund transactions, the degree of responsibility required of the fiduciaries, the types of persons who should be deemed pension 'fiduciaries,' and the standards of accountability they shall be governed by in the management and disposition of pension funds. The only current federal requirement is that the *4646 Secretary of Labor require fiduciaries, trustees, etc., to make disclosure of the provisions and financial operations of the pension plan under the Welfare and Pension Plans Disclosure Act.

***

The Committee endorses the concept of a comprehensive private pension reform program. It believes that expeditious enactment of H.R. 2 will institute a program which will achieve a strengthening of the role played by private retirement plans within the fabric of our economic and social structures..

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This legislation strikes an appropriate and equitable y balance between two opposing schools of thought--those who advocate complete and stringent control of private pensions and those who oppose any form of government supervisory or regulatory control.

FIDUCIARY RESPONSIBILITY

A fiduciary is one who occupies a position of confidence or trust. As defined by the Act, a fiduciary is a person who exercises any power of control, management or disposition with respect to monies or other property of an employee benefit fund, or who has authority or responsibility to do so. It is not the intent of the Committee, however, that where the sole power of

control, management or disposition with respect to plan funds rests with the participants themselves, as may be the case with respect to certain plans where the participant has the sole discretion over an individual account established in his name, that such participants shall be regarded as fiduciaries. The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts.

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TITLE V – ENFORCEMENT

Except where plans are not subject to this Act and in certain other enumerated circumstances, state law is preempted. Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluation of fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports. As indicated previously, however, the Act expressly authorizes cooperative arrangements with state agencies as well as other federal agencies, and provides that state laws regulating banking, insurance or securities remain unimpaired...

VII. SECTION-BY-SECTION ANALYSIS PURPOSES

The Employee Benefit Security Act is designed (1) to establish minimum standards of fiduciary conduct for Trustees, Administrators and others dealing with

retirement plans, to provide for their enforcement through civil and criminal sanctions, to require adequate public disclosure of the plan's administrative and financial affairs, and (2) to improve the equitable character and soundness of private pension plans by requiring them to: (a) vest the accrued benefits of employees with significant periods of service with an employer, (b) meet minimum standards of funding and (c) guarantee the adequacy of the plan's assets against the risk of plan termination prior to completion of the normal funding cycle by insuring the unfunded portion of the benefits promised.

Section 111. Fiduciary responsibility

This section would deem every employee benefit fund to be a trust held for the exclusive purpose of providing benefits to participants and their beneficiaries as well as defraying reasonable administrative expenses. Each plan would have to be in writing.

A fiduciary is defined in section 3(29) as anyone who exercises any power of control, management or disposition with regard to a fund's assets or who has authority to do so or who has authority or responsibility in the plan's administration. Fiduciaries would be required to discharge their duties with respect to the fund ' . . . solely in the interest of the participants and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.'

A fiduciary would also have to diversity the

investments, except in the case of profit-sharing, stock bonus, or thrift and savings plans, so as to minimize the risk of large losses unless under the circumstances it is prudent not to do so and in accordance with the documents and instruments governing the fund.

A fiduciary would be specifically prohibited from making the following transactions:

Dealing with such fund for his own account . . .
Acting in any transaction involving the fund on behalf of a party adverse to the interests of the plan or participants . . .
Receiving personal consideration from any party dealing with the fund in connection with a transaction involving the fund . . .
Transferring property to any party in interest for less than adequate consideration . . .
Permitting the acquisition of property from any party in interest for more than adeauate consideration.

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ADDITIONAL VIEWS

As indicated by my vote to report H.R. 2 out of Committee, I favor legislation to provide reasonable pension protection for the 35 million people enrolled in private pension plans. However, I believe employees covered by State and local government retirement plans are entitled to similar protection, and I fail to understand the Committee's unwillingness to provide them that protection.

To the Committee's credit, it was agreed that public

retirement plans should meet the bill's fiduciary standards and requirements for disclosure of information...

REST 3d TRUSTS § 87 Page 1 Restatement (Third) of Trusts § 87 (T.D. No. 4, 2005)
Restatement of the Law -- Trusts Restatement (Third) of Trusts (Tentative Draft) FNa Current through April 5, 2005

Chapter 16. Extent And Exercise Of Trustees' Powers

§ 87. Judicial Control Of Discretionary Powers

NOTE: At its December meeting, the Council authorized the submission of this Draft (§§ 70-89) to the membership for appropriate action at the Annual Meeting. Because of time constraints and a lengthy agenda, however, the Council completed its review of just twelve sections of the Draft, so the last eight sections (§§ 82-89) will return to the Council this fall, with any revisions that are made following the Annual Meeting.

When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion.
Comments:

a. Scope of Section; cross-references. A trustee generally has discretion (i.e., is to use fiduciary judgment) with respect to the exercise of the powers of the trusteeship. That is, a power is discretionary except

to the extent its exercise is directed by the terms of the trust or compelled by the trustee's fiduciary duties. Even in cases of what are often called "mandatory" powers or provisions, for which trustee compliance is required except as provided in § 66 (equitable deviation in unanticipated circumstances), the trustee often has some discretionary authority and responsibility in important matters of implementation. For example, the terms of a trust may require the sale of certain real property but then, by failing to provide more, leave the trustee to exercise fiduciary judgment with respect to the timing (on which see § 92, Comment b), price, and other terms of the sale. Similarly, room for fiduciary judgment and responsibility may well remain in situations in which a trustee is directed to take action by the holder of a directory power (see § 75, Comment b, Illustration 1) or by the settlor of a revocable trust (§ 74, Comment b, Illustration 3).

The most important of the discretionary powers in most trusts are those having to do with various aspects of the investment function, together with, in many trusts, those having to do with discretionary distributions, such as a power to invade principal for an income beneficiary or the power to distribute income to a beneficiary or among a class of beneficiaries. These matters are dealt with in considerable detail in Chapter 17 (§§ 90-92, on "Investment of Trust Funds") and in § 50 ("Enforcement and Construction of Discretionary Interests"). See also Chapter 23 on discretionary powers in principal-income accounting. The rule of this Section and the principles described in its commentary apply not only to these matters but also to discretionary powers regarding other aspects of trust administration.

This Section applies to discretionary authority that is ordinarily implicit in the powers of trustees (supra) as well as to discretionary authority that is expressly stated in the terms of a trust. Express grants of discretion and accompanying language, however, often present issues of interpretation or effect, sometimes beginning with a question of whether a settlor's "grant" of discretion with regard to a power is merely redundant or confers a broader degree of authority than would normally be implicit in the particular power. See Comment d.

b. Judicial review and control of trustee's discretion. When judicial intervention is required, the court may (ordinarily upon petition by a beneficiary) assert control over the exercise of a discretionary power by directing the trustee to act or refrain from acting or by setting aside a transaction in which the trustee has already acted. Or the court may hold the trustee liable for the adverse consequences of improper conduct, as in other breaches of fiduciary duty. The court may also, or instead: issue instructions clarifying the trustee's duties in exercising the discretionary power (cf. § 71) or otherwise establish safeguards against future abuse; deny or diminish the trustee's compensation; or even remove the trustee if there has been repeated or serious abuse of the discretionary power (see § 37, Comments e and g). Further discussion of remedies is beyond the scope of this Section, but see Chapters 18 (especially § 95) and 19; also see § 50, Comment b.

A court will not interfere with a trustee's exercise of a discretionary power (including a decision not to exercise the power) when that exercise is reasonable, not based on an improper interpretation of the terms of

the trust, and not otherwise inconsistent with the trustee's fiduciary duties (see particularly 76-79). Thus, judicial intervention is not warranted merely because the court would have differently exercised the discretion.

On the other hand, a court may be called upon to intervene for the purpose of preventing a trustee's abuse (including by misinterpretation) of discretionary authority. What constitutes an abuse of discretion depends on the terms and purposes of the trust, and particularly on the terms and purposes of the power and any standards or guidance provided for its exercise, as well as on applicable principles of fiduciary duty. See Comment c. Also relevant is the extent of the discretion conferred upon the trustee. See Comment d.

c. Abuse of discretion: in general. An abuse of discretion may result from the exercise of discretionary authority in bad faith or from improper motive. Thus, a discretionary power is abused if a trustee acts dishonestly, such as when the trustee receives an improper inducement for exercising the power in question. Similarly, an abuse of discretion occurs when a trustee acts from an improper even though not dishonest motive, such as when the act is undertaken in good faith but for a purpose other than to further the purposes of the trust or, more specifically, the purposes for which the power was granted. See, e.g., § 50, Comment b(2), that a discretionary power to make distributions for a beneficiary's "support" does not permit the trustee to make well-intentioned, even otherwise reasonable, distributions that are not support-related.

When the exercise of a discretionary power is left to the judgment of a trustee, an abuse of discretion may result from the trustee's improper failure to exercise that judgment. An abuse of this type results if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion. So also, the court will interpose where a trustee fails to exercise or otherwise abuses discretionary authority because of mistaken interpretation of the terms of the trust or misunderstanding of fiduciary law.

Perhaps most of the litigation in which it is concluded that a trustee has committed an abuse of discretion involves a finding that the trustee, in exercising a power, has acted unreasonably--that is, beyond the bounds of a reasonable judgment. In some cases there is an objective standard by which the reasonableness of the trustee's conduct can be measured, but expressed standards are not necessary in order for a good-faith decision of a trustee to be found unreasonable; a court may apply what has sometimes been called "a general standard of reasonableness," taking account of other terms and purposes of the trust. In either event, judicial intervention on the ground of abuse is called for, not because the court would have exercised the discretion differently, but because the trustee's decision is one that would not be accepted as reasonable by persons of prudence. Thus, a court may properly interpose if it finds that the trustee's conduct, in exercising a discretionary power, fails to satisfy the applicable standard of care and skill (§ 77).

For example, if discretionary power is conferred upon a designated trustee to appoint a successor or additional trustee, and the designated trustee appoints an unfit

person, the court will remove the person so appointed. Other common examples, and many reported cases, of allegedly unreasonable or otherwise abusive exercise of discretion involve either investment management (see commentary and illustrations in §§ 90-92, and Reporters Notes thereto) or discretionary distributions to beneficiaries (see commentary and illustrations in § 50, and Reporter's Note thereto).

Illustrations:

1.The corpus of S's revocable trust passed on her death to T, as her successor trustee, to pay the trust income to S's daughter D during her lifetime, remainder thereafter to go by right of representation to the issue of D who survive her. The terms directed T to sell the real property that had served as S's home and to reinvest the proceeds, "unless T, in his discretion, decides to retain that property for D's use as her residence, which T is hereby authorized to do if and for as long as he believes this to be an appropriate and reasonable use of that property." Shortly after S's death, T received and accepted an offer from P to purchase that residential property (upon terms that no one challenges as unsatisfactory or imprudent if a sale is to made); but T had made no effort to ascertain D's interest or personal or financial circumstances, or otherwise to investigate or consider whether her use of the property as a residence would be "appropriate and reasonable." By failing to exercise his judgment, T has abused his discretionary power regarding retention of the residential property for D's benefit.

2. The same facts as in Illustration 1, except that in the years between S's creation of the revocable trust and

her death, D's husband died and her children became adults, left home, and married. T exercised his judgment, deciding that the residential property was not appropriate to D's needs and circumstances and also finding that D had no desire for the property to be retained for her use. Upon inquiry and investigation, T reached the further conclusion that the residential property would be just right for one of D's sons and his growing family. T therefore decided that the property should be retained and entered into a rental agreement with the son, setting a reasonable rent that could be paid to D as trust income. Absent other facts (e.g., showing grounds for equitable deviation under § 66), T has abused his discretion, even if in good faith, by exercising it for an improper motive--that is, for a purpose other than that for which he was granted discretionary power to retain the property, rather than sell it as otherwise directed.

d. Extended discretion: limitations, interpretation, and effects. Ordinarily, a mere grant of discretion in the terms of the trust, or an express reference to the discretionary character of a power or of powers generally, does not authorize the trustee to act beyond the bounds of reasonable judgment. See, e.g., discussion in § 90, Comments g-g(2).A settlor may, however, manifest an intention to grant greater than ordinary latitude in the trustee's exercise of discretionary judgment.

Once it is determined that the power in question is held in the role of trustee, words such as "absolute" or "sole and uncontrolled" or "unlimited" are not interpreted literally. It is contrary to sound policy, and a contradiction in terms, to permit the settlor to relieve a

trustee of all accountability. See § 50, Comment a, and cf. § 75, Comment c. Even under the broadest grant of fiduciary discretion, a trustee must act honestly and (as cases have sometimes quoted from prior Restatements) "in a state of mind contemplated by the settlor." What this means is that courts will intervene to prevent trustees from acting in bad faith or without regard to the terms and purposes of the trust and the interests of its beneficiaries, or for some purpose or motive other than the accomplishment of the purposes of the discretionary power. Except to the extent the power is for the personal benefit of a beneficiary-trustee, the court may also be called upon to prevent the trustee from failing to act, whether capriciously, arbitrarily, or from a misunderstanding of the trustee's powers or duties.

Within these limits, it is a matter of interpretation to determine the degree to which a settlor's use of language of extended discretion (e.g., "absolute discretion") manifests an intention to modify the normal duties of the trustee and the normal grounds of judicial intervention in the exercise of a discretionary power. A primary question is whether and to what extent the settlor's language may authorize the trustee to act beyond the bounds of what would otherwise be a reasonable judgment.

Examination of the overall tenor of language granting powers and other terms of trusts may lead to diverse, refined interpretations on a case-by-case basis. For example, a court may conclude that the language of extended discretion and other evidence before it manifests a settlor intention to authorize the particular trustee to act with a lesser degree of caution (e.g. to

accept a greater degree compensated risk), but not a lesser degree of care, than would otherwise be appropriate to the particular trust and its circumstances under the duty of prudence (§ 77). Cf., in the investment context, § 91, Comment g(1), and § 90, Comment g. Similarly, on the possibility of a "one-sided" liberalization of discretionary authority with regard to distributions (and on likely reasons for granting extended discretion), see § 50, Comment c (text following Illustrations 3 and 4).

Illustrations:

3. The same facts as in Illustration 2 (in Comment c, above), except that the quoted terms of the trust began "unless T, in his absolute discretion, decides to retain...." The addition of the word "absolute" would not affect the result stated in Illustration 2, because T is still not authorized to retain the property for a purpose other than that for which the extended discretion was granted.

4.The same facts as in Illustration 3, above, except that the language there quoted continues by allowing T to retain "that property for a beneficiary's use as a residence, which T is authorized to do if, and for so long and upon such terms as, T believes appropriate and reasonable." T's actions in retaining the property and in leasing it to D's son are within the range of the authorized discretion (and would appear to be so even without the extended discretion).

5. The same trust as in the foregoing Illustrations (essentially, a trust for D for life, remainder to her issue who survive her), except that the terms of the trust

grant T "absolute and binding discretion, in the event of any controversy or uncertainty, to construe and finally determine the meaning of the trust provisions." Upon the death of D, T distributes the corpus in three equal shares to D's two then surviving children and the surviving spouse of D's other child, who died shortly before D. This is an abuse even of T's extended discretion, there being no "uncertainty" in (or reasonable grounds for "controversy" over) a disposition (Illustration 1 wording) "to the issue of D who survive her" that would justify a construction including the spouse of a deceased child. (Such a broad grant of discretion, however, should ordinarily be interpreted as allowing T to so construe the remainder to D's "issue" as to include her deceased child's adopted or nonmarital child, even if such a traditionally troublesome question of construction would, at the time, have been subject to a different presumption under applicable case law or statutory rule of construction.)

With grants of extended discretion, contrast § 96 on exculpation clauses. An exculpatory provision is not intended to broaden the authority of the trustee, or to encourage or authorize breach of trust, or even to narrow the grounds of judicial intervention, but to relieve the trustee of liability (to the extent provided in the clause and allowed by law) should a breach of trust occur.

REPORTER'S NOTES ON § 87

The earlier counterpart of the material in this Section was Restatement Second, Trusts § 187. The principles stated here are consistent with those of the earlier edition except for the narrow variation indicated in the Reporter's Note to Comment d. The present Section is

relatively brief due to the elaborate treatment of discretionary distribution provisions in § 50 (which had only a modest counterpart in the commentary of prior § 128) and the extensive treatment of discretion in investment matters in §§ 90-92; also see consideration of discretionary powers regarding principal-income accounting in Chapter 23.

See also III William F. Fratcher, Scott on Trusts §§ 187-187.5 (4th ed. 1988); and George G. Bogert & George T. Bogert, The Law of Trusts and Trustees § 560 (Rev. 2d ed., 1980), and cf. id., § 552.

Comment a:

In criticizing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989) (an ERISA case), J. Langbein, "The Supreme Court Flunks Trusts," 1990 Supreme Ct. Rev. 207 (1991), stated (at 219): "This distinction between trust powers that derive from the background law of trusts, and those that derive from the trust instrument, is fundamentally mistaken. It is refuted in the very source that the Court treats as authoritative, section 187 of the Restatement [Second] of Trusts. Official Comment a to section 187 says: '... The exercise of a power is discretionary except to the extent to which its exercise is required by the terms of the trust or by the principles of law applicable to the duties of trustees.' In other words, discretion does not depend upon an explicit grant in the instrument. The trustee has discretion unless the instrument or some particular doctrine of trust law denies discretion. Discretion is the norm."

The power trustees have to maintain lawsuits is

discretionary and not to be interfered with by courts at the instance of beneficiaries without a showing of abuse. Matter of Geffen's Estate, 25 Misc. 2d 734, 202 N.Y.S.2d 599 (Sur.Ct.1960). But where a trust purpose is to sell trust realty, despite a trustee's discretion regarding timing, an allegation of unreasonable delay in the selling is not demurrable. Hawkins v. Tanner, 243 Ala. 641, 11 So.2d 351 (1943).

That an express grant of simple "discretion" in the terms of the trust is ordinarily to be construed as granting the trustee no wider latitude than is already conferred by the prudent investor rule (which itself authorizes flexible, discretionary asset management), but that the settlor's use of that term is likely to expand the authority of a trustee who would otherwise be subject to a more restrictive statutory or commonlaw body of default rules, see § 91, Comments c-c(2) and illustrations in id. Comment c(3).

Comments b and c:

For a few of the cases citing or quoting prior Restatement provisions similar to those in Comments b and c of this Section, see Moench v. Robertson, 62 F.3d 553 (3d Cir.1995), cert. denied, 516 US 1115 (1996) noted 58 U. of Pittsburgh L. Rev. 255 (1996), and 49 Rutgers L. Rev. 1231 (1997); and Raffety v. Parker, 241 F.2d 594 (8th Cir.1957); In re Trust Estate of Wills, 8 Ariz.App. 591, 448 P.2d 435 (1968); Takabuki v. Ching, 695 P.2d 319 (Haw. 1985); Johnson v. Johnson, 242 Iowa 27, 45 N.W.2d 573 (1951) (power of sale), noted 6 Arkansas L. Rev. 78; Jennings v. Murdock, 220 Kan. 182, 553 P.2d 846 (1976); Boston Safe Deposit & Trust Co. v. Stone, 348 Mass. 345, 203 N.E.2d 547 (1964) (power to fix

values); United States v. O'Shaughnessy, 517 N.W.2d 574 (Minn.1994); Yeates v. Box, 198 Miss. 602, 20 So.2d 411 (1945) (power to terminate trust); Matter of Heisserer, 797 S.W.2d 864 (Mo.App.1990); In re Frances M. Johnson Trust, 211 Neb. 750, 320 N.W.2d 466 (1982); Hanford v. Clancy, 87 N.H. 458, 183 A. 271 (1936); Matter of Roberts, 61 N.Y.2d 782, 461 N.E.2d 300, 473 N.Y.S.2d 163 (1984); Little v. Wachovia Bank & Trust Co. 252 N.C. 229, 113 S.E.2d 689 (1960) (principal-income allocation power); Geron v. Kennedy, 381 Pa. 97, 112 A.2d 181 (1955); Krug v. Krug, 838 S.W.2d 191 (Tenn. App. 1992) (power to remove and replace co-trustee), appeal denied, 838 S.W.2d 197 (Tenn. 1992); Austin v. U.S. Bank, 73 Wash. App. 293, 869 P.2d 404 (1994), review denied, 124 Wash. 2d 1015, 880 P.2d 1005 (1994); and Estate of Filzen, 252 Wis. 322, 31 N.W.2d 520 (1948) (discretion to terminate).

See generally Scott on Trusts, supra, § 187:

... [T]he court will not control [a trustee's] exercise of [discretion] as long as he does not exceed the limits of the discretion conferred upon him. The court will not substitute its own judgment for his. Even where the trustee has discretion, however, the court will not permit him to abuse the discretion. This ordinarily means that so long as he acts not only in good faith and from proper motives, but also within the bounds of a reasonable judgment, the court will not interfere; but the court will interfere when he acts outside the bounds of a reasonable judgment. In other words, although there is a field, often a wide field, within which the trustee may determine whether to act or not and when and how to act, beyond that field the court will control him. How wide that field is depends upon the terms of

the trust, the nature of the power, and all the circumstances....

In determining whether the trustee in exercising or refraining from exercising a power is abusing the discretion conferred upon him, much depends of course upon the extent of the discretion intended by the settlor to be conferred upon him ... [and] upon whether there was any standard by which the trustee's conduct can be judged....

Compare Bogert & Bogert, supra, § 560 (pp. 194-195, 207):

Clearly, if the trustee who has the discretionary power has failed or refused to exercise that power or to consider its use, the court may compel him to review the question of whether to exercise the power in light of all surrounding circumstances and to make some decision.... [¶] So also, if the trustee has gone through the formality of using his discretion but has not deliberately considered the arguments pro and con, and has thus made a decision for no reason at all, his conduct can be characterized as arbitrary and capricious, ... [and] as not in performance of his duty in regard to the discretionary power.... [¶] On the other hand, a trustee who is authorized to retain oil investments will not be subjected to court intervention with his discretion if he has acted honestly, even though the securities are returning a very small income and many trustees would have sold them.

That, absent any standards in the terms of the trust for the trustee's (and court's) guidance, a court will require a trustee to follow a general standard of reasonableness

in exercising a discretionary power, see, e.g., Rowe v. Rowe, 219 Ore. 599, 347 P.2d 968 (1959); and Rinker's Adm'r. v. Simpson, 159 Va. 612, 166 S.E. 546 (1932) (clear standard or guide in terms of power not essential to finding good-faith decision so unreasonable as to constitute an abuse of discretion under language "as [trustee] deems best"), noted in 81 U. of Pennsylvania L. Rev. 1008 (1933).

Various aspects of a trustees' judgments in the maintenance and general management of a farm were challenged in Goodwine v. Goodwine, 819 N.E.2d 824 (Ind.App.2004), but the trial and appellate courts found that the trustees had not acted in an unreasonable manner that would constitute an abuse of their discretion. But in Alexander v. Nelson, 825 S.W.2d 106 (Tenn.App.1991), the court held it improper for the trustee to sell property to a child of the testator for a price significantly below its market value, despite a trust provision granting power to sell trust property to children of the settlor for a "price and upon such terms as [the trustee] thinks best" (cf. § 79(1) on impartiality); and cf. Keeler v. Lauer, 73 Kan. 388, 85 P. 541 (1906), that a trust provision relieving the trustee of any duty to report to a court did not relieve the trustee from accountability in court for mismanagement.

In re Watland, 211 Minn. 84, 300 N.W. 195 (1941), found it unreasonable, and an abuse of discretion, for the trustee to allocate to income the proceeds of the sale of trust securities. Also, on discretionary powers to make allocations between income and principal, compare In re Clarenbach's Trust, 23 Wis. 71, 126 N.W.2d 614 (1964), with the much-cited case of Dumaine v. Dumaine, 301 Mass. 214, 16 N.E.2d 625 (1938), 118

A.L.R. 834; both cases involved discretionary allocation of capital gains. See also oft-cited Old Colony Trust Co. v. Silliman, 352 Mass. 6, 223 N.E.2d 504 (1967). And see Gimbel v. B.F. & A.B. Gimbel Foundation, 95 N.J. Super. 418, 231 A.2d 389 (1974) (discretionary principal-income power not to be used to alter substantially the value of the interests of the income and remainder beneficiaries); Comment, "Principal and Income: The Discretionary Allocation Clause," 30 Baylor L. Rev. 343 (1978); and compare 1997 Revised Uniform Principal and Income Act § 2 that "no inference of imprudence or partiality arises from the fact that a trustee" with discretionary authority "has made an allocation contrary to the provisions of this Act." On the possible adverse effects of extended discretion regarding principal-income accounting, see Samuel P. Hunt Trust v. U.S., 93 A.F.T.R.2d 351 (D.N.H.2004) (gains not permanently set aside for charity).

A court found an abuse of discretion in Thomas v. Wood, 228 Ga. 206, 184 S.E.2d 561 (1971), in a situation in which a trustee, having broad power to manage trust property as he deemed appropriate, paid off a loan amount in excess of the amount of the lien against trust realty even though the testatrix (settlor) had no personal liability on the loan.

In Benadom v. Colby, 81 Md. App. 222, 567 A.2d 463 (1989), the court construed a provision in the trust agreement as granting the trustees power to interpret the trust's dispositive provisions, and therefore held that the trial court had erred by not deferring to the trustees' interpretation of the distributive provision in question. Compare Bogert & Bogert, supra, § 559 (p. 169): "Although the settlor may give the trustee power

to construe the trust instrument in case of dispute or doubt, the trustee's decision will be subject to review by the court as to its reasonableness."

"Discretion is the touchstone of trusteeship, and we invade the province of the trustee only when he violates the proper exercise of his discretion." Lowry v. Bankers Life & Casualty Retirement Plan, 865 F.2d 692, 694 (5th Cir.1989) (ERISA case). And see (another ERISA case) Exbom v. Central States Welfare Fund, 900 F.2d 1138, 1142 (7th Cir.1990): "Under the common law courts will not review the discretionary decisions of trustees and other fiduciaries de novo, but will look only for the trustee's abuse of its discretionary authority."

For an example of judicial intervention based on a trustee's misinterpretation of trust terms, see Griffin v. Griffin, 463 So.2d 569 (Fla.App.1985).

For an example of court intervention for nonexercise of discretion, see Clark v. Mississippi Valley Trust Co., 357 Mo. 785, 211 S.W.2d 10 (1948). Cf. Matter of Osborn, 252 App. Div. 438, 299 N.Y.S. 593 (1937) (trustee responding to demands of a beneficiary without exercise of independent judgment); and Jacob v. Davis, 128 Md. App. 433, 738 A.2d 904 (1999), cert. denied 357 Md. 482, 75 A.2d 436 (2000). For an example of the removal of a trustee for favoring one beneficiary over others in exercising discretion (see § 79 on duty of impartiality), see Jones v. Jones, 8 Misc. 660, 30 N.Y.S. 177 (1894); and cf. Wiggins v. PNC Bank, 988 S.W.2d 498 (Ky.App.1998).

For an example of judicial intervention on behalf of

persons holding support judgments against the beneficiary of a discretionary spendthrift trust, based on the trustee's abuse of his discretion by withholding discretionary distributions, see Ventura County Dept. of Child Support Services v. Brown, 116 Cal. App. 4th 144, 11 Cal. Rptr. 3d 489 (2004). Cf. § 60, Comment c, and also (on spendthrift exception) § 59, Comment b.

For a refusal to intervene, finding no abuse of discretion or other breach of fiduciary duty, where it was alleged that the trustees (in exercising their broad discretion to amend the trust) had violated their duties to plaintiff by modifying the trust to eliminate her beneficial interest, see Rubinson v. Rubinson, 250 Ill.App. 3d 206, 620 N.E.2d 1271, 190 Ill.Dec. 10 (1993) (the court concluding that the trustees' action was consistent with the settlor's intention in granting the power).

Comment d:

Policy limits on settlor's grant of extended discretion. In Carrier v. Carrier, 226 N.Y. 114, 125, 123 N.E. 135, 138 (1919), the opinion (Cardozo, J.) acknowledged that the trustee had very broad management powers and that his discretion was to be "absolute and uncontrolled" but stated that this does not mean "that it might be recklessly or willfully abused," adding: "He had made himself a trustee; and in so doing had subjected himself to those obligations of fidelity and diligence that attached to the office of trustee." And the court in Keating v. Keating, 182 Iowa 1056, 1069, 165 N.W. 74, 77-78 (1917), stated: "We think ... that no trust has been or can be created in property where the discretion of the trustee is so broad or illimitable that equity will not

entertain a complaint by the beneficiary that the trust has been or is being abused, or that the property is being wrongfully diverted to the destruction or defeat of the purpose for which the founder established it.... And we think if the devise in this case were to be construed in accordance with the defendant's theory as being intended to give him absolute and uncontrolled discretion independent of any authority in the court to control its arbitrary exercise, it would have to be held, to that extent, void."

Compare Armitage v. Nurse, [1998] Ch. 241 (CA), in which Millot, L.J., stated (at 253-254): "[T]here is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.... The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts...."

Effect and construction of language of extended discretion. Comment j of Restatement Second, Trusts § 187 states that the settlor may manifest an intention "that the trustee's judgment need not be exercised reasonably, even when there is a standard by which the reasonableness of the trustee's conduct can be judged." The Comment continues: "This may be indicated by a provision in the trust instrument that the trustee shall have 'absolute' or 'unlimited' or 'uncontrolled' discretion"--language that is "ordinarily construed as merely dispensing with the standard of reasonableness" so that "the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient

ground for interposition by the court." The Comment adds, however: "[T]he court will interfere if the trustee acts in a state of mind not contemplated by the settlor. Thus, the trustee will not be permitted to act dishonestly, or for some motive other than the accomplishment of the purposes of the trust, or ordinarily to act arbitrarily without an exercise of his judgment." Id., Comment k ("Limits of power of settlor to confer discretion") further observes that, if a trust is created, it is "against public policy to permit the settlor to relieve the trustee of all accountability."

Although the commentary here (to present § 87) does not foreclose the possibility of an interpretation that dispenses with the requirement of "reasonableness," it does not follow Trusts Second in its recognition of that result as the ordinary construction of typical language of extended discretion (i.e., "absolute," "sole and uncontrolled," and the like), because that construction neither seems routinely appropriate nor does case authority actually support that generalization. It is difficult to find cases in which the court has upheld an exercise of discretion that, in the circumstances, truly appears to have been unreasonable. Compare the segment specially entitled "Update: Absolute or Uncontrolled Discretionary Powers of Trustees" in the 2003 Supplement to § 560 of Bogert & Bogert, supra: "In many cases it would appear that the same result is reached regardless of which standard [i.e., extended or simple discretion] is applied by the court.... There is agreement that a trustee must act in good faith and without an improper motive, and that a trustee must not act arbitrarily or capriciously, that is, without any exercise of his judgment.... All courts probably would agree that the trustee's absolute discretion cannot be

exercised to defeat the settlor's intent or the trust purposes.... [9f] Sometimes the trustee is given the power to invest in his absolute and uncontrolled discretion; in several recent cases the court found that ... the grant of discretion did not protect the trustee from liability for imprudent investments. Where the trustee is granted broad discretion in making allocations of receipts and disbursements to the principal and income accounts, some courts have held that the trustee nevertheless must follow the applicable principal and income statute, while other courts have given effect to the grants of discretion by construing that they authorize the trustee to deviate from established principal and income law, although holding that the exercise of discretion remains subject to the standards of reasonableness and good faith and that an exercise of the power must not defeat the settlor's intent or the trust purposes.... [9f] It would appear that the difference in the attitude of the courts toward 'simple' discretionary powers, on the one hand, and 'absolute' or 'uncontrolled' discretionary powers, on the other hand, is one of degree rather than of kind. The courts appear more likely to find an abuse of a simple discretionary power than an abuse of an absolute or uncontrolled discretionary power...." The original version (of rev. 2d ed., 1980) of Bogert & Bogert, supra, § 560 (after quoting from a couple of leading cases (also quoted, supra this Note) on the limits of discretion), expressed some doubt about the Restatement Second position and stated essentially (at 213-215) that the difference between extended and simple discretion is one of degree more than of kind, noting that even an "absolute discretionary power must not be used in a 'extravagantly unreasonable' or 'arbitrary' manner ... or for a purpose other than a trust purpose" and then

further observing (at 220- 221) that it "may be concluded" that courts "are more easily persuaded to find an abuse of a mere discretionary power than to find an improper use of an absolute or uncontrolled power."

A case that at least appears supportive of the Restatement Second position is In re Koos' Estate, 269 Wis. 479, 69 N.W.2d 598 (1955), in which the trustees were granted "absolute discretion" in exercising their power to sell certain securities; upon challenge to their exercise of the power of sale, the court refused to interfere or surcharge the trustees in the absence of a showing of fraud, arbitrary action, or bad faith because the trustees' discretionary action need not conform to a standard of reasonableness, quoting at length (id. at 492, 69 N.W.2d at 606) from Restatement Second, Trusts § 187, Comment j. And cf. Matter of Fleet Trust Co., 262 App. Div. 2d 935, 692 N.Y.S.2d 548 (1999). (The trustees' decision in neither case, however, would seem likely to shock an observer on the lookout for unreasonable fiduciary behavior.)

Illustration 5. In Taylor v. McClave, 128 N.J. Eq. 109, 15 A.2d 213 (1940), the trust terms granted the trustees power to construe the instrument in case of dispute or doubt and provided that their determinations of its meaning were to be final, but the court concluded that this did not preclude intervention when a construction is erroneous, because a court's equitable powers cannot be eliminated by trust provision. Compare, in England, Re Wynn's Will Trusts, [1952] 1 All Eng. Rep. 341 (grant of absolute discretion, to be binding on all beneficiaries, to resolve all questions and matters of doubt in administering the trust; contrary to public policy as an attempt to oust the court from its equitable

jurisdiction).

Also on Illustration 5, see Benadom v. Colby, 81 Md. App. 222, 567 A.2d (1989) and Bogert & Bogert, super, § 559 (p. 169), both of which are discussed (or quoted) near the end of the Reporter's Note to Comments b and c, above. But compare Old National Bank & Trust Co. v. Hughes, 16 Wash. 2d 584, 134 P.2d 63 (1943), in which a trustee's discretionary power to determine the trust beneficiaries was upheld when there was no showing of arbitrary or dishonest conduct.

The trustees in In re Teasdale's Estate, 261 Wis. 248, 52 N.W.2d 366 (1952), were given discretionary power, to be conclusive, final and not reviewable, to establish the value of the settlor's estate at death in order to determine the extent of his widow's beneficial interest; but the court concluded that the valuations determined by the trustees (one of whom was the widow) should be set aside and proper values substituted because the trustees' values were unduly favorable to the widow and not reached in good faith (thus, certainly in violation of the duty of impartiality). Cf. Matter of Bruches, 67 App. Div. 2d 456, 415 N.Y.S.2d 664 (1979).

See also Estate of Hansen, 344 Pa. 12, 15, 23 A.2d 886, 887 (1942) (valuation at inventory values instead of market values rejected despite trustees' power to value securities, upon receipt, at what the trustees consider to be a fair and equitable amount): "[N]o matter how broad the discretion granted, equity will interfere to prevent its exercise in a manner that would frustrate the true intent and purpose of the testatrix."
For examples of nonexercise of discretion, see In re Murray, 142 Me. 24, 45 A.2d 636 (1946), and Coberly v.

Superior Court, 231 Cal. App. 2d 685, 42 Cal. Rptr. (1965). And see Conway v. Emeny, 139 Conn. 612, 96 A.2d 221 (1953), which found an abuse and issued an injunction to prevent the trustees of a museum from implementing their decision to close the museum as they were empowered to do if in their "absolute discretion" they determined there was insufficient public interest to warrant its continuance, with the result that the trust funds would pass to another charitable trust that was founded by the same settlor and had great need for additional funds; the trustees had abused their extended discretion by voting to close the museum without actual consideration of the public interest in it.

Just as an exculpatory clause does not broaden the trustee's authority (last paragraph of Comment), a trustee's "wide discretion" did not serve "as exculpatory of the liability of a trustee" for imprudent exercise of a discretionary power in McNeil v. McNeil, 798 A.2d 503, 509 (De1.2002).

FNa As of the date of publication, this Draft has not been considered by the members of The American Law Institute and does not represent the position of the Institute on any of the issues with which it deals. The action, if any, taken by the members with respect to this Draft may be ascertained by consulting the Annual Proceedings of the Institute, which are published following each Annual Meeting.

Restatement of the Law -- Trusts Restatement (Second) of Trusts Current through April 2005

Chapter 7. The Administration Of The Trust Topic 2. Duties Of The Trustee

176. Duty To Preserve The Trust Property

Link to Case Citations

The trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property.

Comment:

a. Standard of care and skill. Except as otherwise provided by the terms of the trust, it is the duty of the trustee to exercise such care and skill to preserve the trust property as a man of ordinary prudence would exercise in dealing with his own property, and if he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill as he has. Compare § 174. b. Protection from loss or damage. It is the duty of the trustee to use reasonable care to protect the trust property from loss or damage. Illustrations:

1. A is trustee of certain securities. He carelessly keeps the securities in his desk instead of placing them in a safe deposit box. The securities are stolen. A is liable for the loss.

2. A is trustee of a farm. He carelessly allows farm implements to be left exposed to the weather so that they are damaged. A is liable for the damage.

It is the duty of the trustee to take reasonable steps to procure such insurance as is customarily taken by prudent men.

Illustration:

3. A is trustee of a house. He fails to take out fire insurance upon the house, although such insurance is customarily taken by prudent men. The house burns. He is liable for the loss.

It is ordinarily the duty of the trustee to bring such actions as are reasonably necessary for the protection of the trust estate. Compare § 177.

Illustration:

4. A is trustee of certain chattels. B converts the chattels. Although B is solvent and a prudent trustee would have brought an action against him to recover the chattels or their value, A neglects to do so. B later becomes insolvent. A is liable.

It is ordinarily the duty of the trustee to pay taxes and mortgage interest on the trust property.

It is ordinarily the duty of the trustee who is entrusted with the control and management of a house or other building to make such repairs as are necessary to preserve it. Ordinarily it is not his duty to make permanent improvements. See 188, Comment e.

c. Where no hinds available for protection. If the preservation of the trust property involves the payment of money and there is not sufficient money in the trust estate for the purpose and the trustee cannot

raise the money from the trust property by mortgage or sale or otherwise, it is the duty of the trustee to notify the beneficiaries in order to give them the opportunity to advance the money. If, however, he cannot so raise the money he is not under a duty to advance the money out of his individual property.

Illustration:

5. A is trustee of certain securities which constitute the whole of the trust property. He misappropriates them and is removed as trustee and B is appointed successor trustee. B demands the securities from A but A refuses to return them or to pay their value. B does not notify the beneficiaries of the situation or ask them to advance the money necessary to maintain a suit against A. A is solvent at the time but later dies insolvent. B is liable for the loss. He would not have been liable if he had notified the beneficiaries and they had refused to advance any money.

d. Terms of the trust. By the terms of the trust the duty of the trustee with respect to the preservation of the trust property may be modified. Thus, by the terms of the trust a trustee of land may be directed to allow a life beneficiary to occupy the land and the trustee may be relieved of the duty to keep it in repair.

Case Citations

Cross References through December 1958
Case Citations January 1959 – June 1986
Restatement of the Law -- Trusts Restatement (Second) of Trusts Current through April 2005

Chapter 7. The Administration Of The Trust Topic 2. Duties Of The Trustee

183. Duty To Deal Impartially With Beneficiaries

Link to Case Citations

Note: This section or its commentary has been revised in the Restatement Third, Trusts (Prudent Investor Rule). Readers should consult that volume to determine the nature of the revision.

When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.

Comment:

a. The rule stated in this Section is applicable whether the beneficiaries are entitled to interests in the trust property simultaneously or successively.

By the terms of the trust the trustee may have discretion to favor one beneficiary over another. The court will not control the exercise of such discretion, except to prevent the trustee from abusing it. See § 187.

As to successive beneficiaries, see §§ 232-241.

Case Citations

Cross References through December 1958
Case Citations January 1959 -- June 1986

Case Citations July 1986 -- June 2004

Cross References through December 1958:

Cross References to Restatement (Second) of Trusts § 187 (1959)

Restatement of the Law -- Trusts Restatement (Second) of Trusts Current through April 2005

Chapter 7. The Administration Of The Trust
Topic 3. Powers Of The Trustee

187. Control Of Discretionary Powers

Link to Case Citations

Note: This section or its commentary has been revised in the Restatement Third, Trusts (Prudent Investor Rule). Readers should consult that volume to determine the nature of the revision.

Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion.

See Reporter's Note.

Comment:

a. When powers are discretionary. The exercise of a power is discretionary except to the extent to which its exercise is required by the terms of the trust or by the principles of law applicable to the duties of trustees. As to the principles of law applicable to the duties of

trustees, see §§ 169-185.

By the terms of the trust or by the principles of law applicable to the duties of trustees, it may be the duty of the trustee to exercise a power conferred upon him, or, on the other hand, he may have discretion whether to exercise the power or not. Even though it is the duty of the trustee to exercise a power, he may have discretion as to the time, manner and extent of its exercise.

b. Methods of control. When the court controls the exercise of a power by the trustee, it may do so by directing him to act or refrain from acting; by setting aside the transaction where he has already acted; or by holding him liable for the results of his action or non-action. The court will sometimes remove a trustee or deny or diminish his compensation where he has abused discretion conferred upon him.

c. Kinds of discretionary powers. The rule stated in this Section is applicable both to the powers of managing the trust estate conferred upon the trustee either in specific words or otherwise, and also to such powers as may be conferred upon him to determine the disposition of the beneficial interest. Thus, it is applicable not only to powers to lease, sell or mortgage the trust property or to invest trust funds, but also to powers to allocate the beneficial interest among various beneficiaries, to determine the amount necessary for a beneficiary's support, or to terminate the trust.

As to a discretionary power to apply principal for the benefit of the income beneficiary, see § 128, Comment i.

As to a discretionary power to allocate receipts or expenses to income or principal, see § 233, Comment p.

d. Factors in determining whether there is an abuse of discretion. In determining the question whether the trustee is guilty of an abuse of discretion in exercising or failing to exercise a power, the following circumstances may be relevant: (1) the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.

e. No abuse of discretion. If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment. The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power by the trustee. Thus, if the trustee is empowered to apply so much of the trust property as he may deem necessary for the support of the beneficiary, the court will not interfere with the discretion of the trustee on the ground that he has applied too small an amount, if in the exercise of his judgment honestly and with proper motives he applies at least the minimum amount

which could reasonably be considered necessary, even though if the matter were left to the court determine in its discretion it might have applied a larger amount. So also, the court will not interfere on the ground that the trustee has applied too large an amount, if in the exercise of his judgment honestly and with proper motives he applies an amount not greater than a reasonable person might deem necessary for the beneficiary's support, although the amount is greater than the court would itself have awarded.

f. Dishonesty. The court will control the trustee in the exercise of a power where he acts dishonestly. Thus, if the trustee receives a bribe for exercising or failing to exercise a power, the court will interpose.

Illustration:

1. A bequeaths all his property to B in trust to divide it between C and D in such shares as B in his discretion might determine. C pays B $1000 in order to induce B to appoint three-fourths of the fund to C and one-fourth to D, and B appoints accordingly. The court will set aside the appointment.

g. Improper motive. The court will control the trustee in the exercise of a power where he acts from an improper even though not a dishonest motive, that is where he acts from a motive other than to further the purposes of the trust. Thus, if the trustee in exercising or failing to exercise a power does so because of spite or prejudice or to further some interest of his own or of a person other than the beneficiary, the court will interpose. Although ordinarily the court will not inquire into the motives of the trustee, yet if it is shown that

his motives were improper or that he could not have acted from a proper motive, the court will interpose. In the determination of the question whether the trustee in the exercise of a power is acting from an improper motive the fact that the trustee has an interest conflicting with that of the beneficiary is to be considered.

Illustrations:

2. A devises Blackacre to B in trust and directs B to sell Blackacre if in his judgment such sale would be for the best interest of the beneficiaries. It clearly appears that a sale would be highly advantageous to the beneficiaries, but B refuses to sell the land solely on the ground that the purchaser would probably use the land in a manner to cause a depreciation in value of B's own land situated nearby. The court may order a sale of land.

3. A bequeaths $100,000 to B in trust to pay $2000 a year to C and to pay the whole income to C if he should marry a woman of good reputation of which the trustee should be the sole judge. C marries D and B refuses to pay the whole income to C. It appears that D is a woman of unblemished character and reputation and that B's refusal to pay the income is due to the fact that D is of a different religious faith from C. The court will compel B to pay the whole income to C.

4. A bequeaths $60,000 to B in trust to pay half of the income to C for life and to pay the other half of the income to D for life and on C's death to pay the whole of the principal to D. By the will it is provided that B may in his discretion pay C as much of the second half of the

income as shall be necessary for the support of C. Owing to a great increase in the cost of living, the income from one-half of the fund becomes insufficient for C's support according to the standard existing at A's death. B refuses to pay more than one-half of the income to C solely on the ground that C has married without B's consent. The court will compel B to make payments to C out of the other half of the income.

h. Trustee's failure to use his judgment. The court will control the trustee in the exercise of a power where its exercise is left to the judgment of the trustee and he fails to use his judgment. Thus, if the trustee without knowledge of or inquiry into the relevant circumstances and merely as a result of his arbitrary decision or whim exercises or fails to exercise a power, the court will interpose.

Illustrations:

5. A bequeaths $100,000 to B in trust to apply such part of the income as B should think proper for the maintenance of C and to pay the balance of the income to D. B arbitrarily pays the whole income to D. The court may set aside the payment to D in whole or in part.

6. A bequeaths certain securities to B in trust to distribute them in specie to C and D at such valuations as shall appear to him fair and just. Without making any inquiry into the value of the different securities B makes the distribution in accordance with their par value, although in fact the securities vary in value, with the result that C's share is worth much more than D's share. The court will set aside the distribution in whole

or in part.

So also the court will interpose where the trustee fails to use his judgment because of a mistaken view as to the extent of his powers or duties, whether the mistake is one of law or fact.

Illustrations:

7. A bequeaths property to B in trust directing B to provide suitable maintenance for C out of the income, and authorizing B to determine what constitutes suitable maintenance. C becomes insane and is confined in a public asylum. B erroneously believes that under the terms of the will he is not justified in making any payment for C under the circumstances. For this reason B refuses to make any further payment for C. The court may order B to make such payments as are necessary for the suitable maintenance of C.

8. A bequeaths $100,000 to B in trust to pay to C such sums as in B's judgment C may need by reason of sickness or other misfortune. C himself continues in good health but being very poor he incurs unusual expenses because of sickness and death in his family. B erroneously believes that under the terms of the will he is not justified in making any payment to C unless C himself is sick. For this reason he makes no payment to C. The court will order B to pay a reasonable amount to C.

So also, the court will interpose where the trustee instead of exercising his judgment delegates the matter to the judgment of another. See § 171.

i. Reasonableness of trustee's exercise of judgment. If there is a standard by which the reasonableness of the trustee's judgment can be tested, the court will control the trustee in the exercise of a power where he acts beyond the bounds of a reasonable judgment, unless it is otherwise provided by the terms of the trust. This rule is applicable where discretion is conferred upon the trustee in matters relating to the management of the trust. Thus, the court will interpose if the trustee in administering the trust fails to exercise proper care and skill. See § 174. Although discretion is conferred upon the trustee as to the choice of investments, he cannot properly invest in hazardous securities. See § 227. If the trustee is directed to sell certain trust property but is given discretion to postpone the sale, the court will interpose if he fails to sell for so long a time and under such circumstances that the postponement is beyond the bounds of a reasonable judgment. If power is conferred upon the trustee to appoint a successor trustee and he appoints an unfit person, the court will remove the person so appointed.

This rule is applicable where the power is to be exercised under certain circumstances the existence of which is to be determined by the exercise of the judgment of the trustee.

Illustrations:

9. A bequeaths $100,000 to B in trust to pay C the income until B should deem C competent to manage the property and then to pay the principal to C. By the terms of the trust any successor trustee is to have the same power. C brings suit to compel B to pay the principal to him. In his bill C alleges that he is of good

habits and character, that he is successfully managing his business affairs and holds high judicial office. A demurrer to the bill will be overruled. If, however, on the hearing the allegations are not proved and reasonable men might differ on the question whether C is competent to manage the property, the court will not order B to pay the principal to C.

10. A bequeaths $100,000 to B in trust to pay the income to C and on C's death to pay the principal to C's children. By the terms of the trust B is empowered to pay the whole or any part of the principal to C if he deems it best for the interest of C. C is a drunkard and a spendthrift. The court may order B not to pay the principal to C.

This rule is applicable where the trustee is under a duty to exercise a power but the extent or manner of its exercise is left to the judgment of the trustee. Thus, if the trustee is empowered to apply so much of the trust property as he may deem necessary for the support of the beneficiary and the trustee does not apply at least the minimum amount which could reasonably be considered necessary for the beneficiary's support, the court will compel the trustee to pay the beneficiary at least that minimum amount. Similarly, if the trustee applies more than the maximum amount which could reasonably be considered necessary for the beneficiary's support, the court will interpose.

Illustrations:

11. A bequeaths $50,000 to B in trust to apply for the support of C so much of the income as B deems necessary to support C. B is paying C $100 a month.

The evidence shows that $150 a month is the minimum amount reasonably necessary for C's support. The court may order B to pay C $150 a month.

12. A bequeaths $200,000 to B in trust to pay to C so much as is necessary for his support and to pay the balance of the income to D. B proposes to pay to C the whole of the income amounting to $10,000, although under the circumstances $4000 is the maximum amount which can reasonably be considered necessary for C's support. At the suit of D the court will enjoin B from paying C more than $4000.

The nature of the power conferred upon the trustee, however, may be such that there is no standard indicated by the terms of the trust by which the reasonableness of his conduct in exercising or failing to exercise the power can be judged. In such a case, however, the court will interpose if the trustee acts dishonestly, or from some improper motive. Thus, if power is conferred upon the trustee to appoint income or principal in favor of a particular beneficiary if he so chooses, without any reference to the needs of the beneficiary, the court will not interpose if the trustee acts honestly and from proper motives.

Illustration:

13. A bequeaths $100,000 to B in trust to pay the income to C for life with a provision that B may if he chooses pay any amount not exceeding $1000 a year from the income to D during the life of C. B, acting in good faith and from proper motives, refrains from making any payment to D. The court will not direct B to make any payment to D.

j. Interpretation of trust instrument as to extent of discretion. The extent of the discretion conferred upon the trustee depends primarily upon the manifestation of intention of the settlor. The language of the settlor is construed so as to effectuate the purposes of the trust. The mere fact that the trustee is given discretion does not authorize him to act beyond the bounds of a reasonable judgment. The settlor may, however, manifest an intention that the trustee's judgment need not be exercised reasonably, even where there is a standard by which the reasonableness of the trustee's conduct can be judged. This may be indicated by a provision in the trust instrument that the trustee shall have "absolute" or "unlimited" or "uncontrolled" discretion. These words are not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness. In such a case the mere fact that the trustee has acted beyond the bounds of a reasonable judgment is not a sufficient ground for interposition by the court, so long as the trustee acts in a state of mind in which it was contemplated by the settlor that he would act. But the court will interfere if the trustee acts in a state of mind not contemplated by the settlor. Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the accomplishment of the purposes of the trust, or ordinarily to act arbitrarily without an exercise of his judgment.

Illustration:

14. A devises Blackacre to B in trust and directs B to sell Blackacre if "in his uncontrolled discretion" he should deem such sale for the best interest of the beneficiaries. It clearly appears that a sale would be

highly advantageous to the beneficiaries, but B refuses to sell the land solely on the ground that the purchaser would probably use the land in a manner to cause a depreciation in value of B's own land situated nearby. The court may order a sale of the land.

k. Limits of power of settlor to confer discretion. The settlor cannot confer upon the trustee such an unlimited power that the court will not entertain a suit by the beneficiary to prevent the trustee from acting dishonestly. It is against public policy to permit the settlor to relieve the trustee of all accountability. See § 172. It is true that the powers conferred upon the transferee of property may be so extensive as to indicate an intention not to create a trust but to give the beneficial interest in the property to the transferee. See § 125. If, however, a trust is created, it is required by public policy that the trustee should be answerable to the courts, so far at least as the honesty of his conduct is concerned.

Illustrations:

15. A bequeaths all his property to B in trust to divide it between C and D in such shares as B might determine in his absolute and uncontrolled discretion without being answerable therefor to any court. C pays B $1000 in order to induce B to appoint three-fourths of the fund to C and one-fourth to D, and B appoints accordingly. The court will set aside the appointment.

16. A devises a farm to B, his eldest son, in trust for the benefit of C, his youngest son. By the terms of the trust it is provided that if C should prove to be a careful and prudent man, B should convey the property to him if B

should think best, but it was further provided that B should not be required to convey by any court. It was further provided that on the death of C, B should be entitled to keep the farm for his own benefit. C sues B to compel him to convey the farm to him. It clearly appears that C is a careful and prudent man and that B's refusal to convey was not based upon an honest exercise of discretion, but solely on B's desire to keep the farm for himself. The court will compel B to convey the farm to C.

As to the effect of a provision in the terms of the trust dispensing with the necessity of formal accounting by the trustee, see § 172, Comment d.

By the terms of the trust a discretionary power may be conferred on the trustee to determine questions relating to the distribution of trust property. There is no public policy which prevents the avoidance of litigation by committing the determination with finality to the trustee. Thus it may be provided that in determining what is income and what is principal the trustee's decision shall be final. See § 233, Comment p.

1. Cross references. As to the effect upon the liability of the trustee of exculpatory provisions in the terms of the trust, see § 222.

As to the exercise of control by the court over powers where there are several trustees, see § 194.

Case Citations

Reporter's Notes & Cross References through December 1958 Case Citations January 1959 -- June

1986

Case Citations July 1986 -- June 2004 Case Citations

July 2004 -- November 2004 Reporter's Notes & Cross

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NOTES

The court will not interfere with the trustee in his exercise of discretionary powers, unless he is guilty of an abuse of discretion. See the following cases which cite the Restatement of Trusts, § 187. Industrial Trust Co. v. Commissioner

Article XI. Subrogation

11.1 Plan's Right of Subrogation. In the event of any Benefit payments made under the Plan to or on behalf of any Employee, the Plan shall, to the extent of such payments, be subrogated to all the rights of recovery and other rights of the Employee arising out of any claim or cause of action which may accrue because of the alleged accidental, negligent, intentional, or totious conduct, act or omission of another person or entity including, without limitation, the Employer of another Employee (hereinafter all such persons or entities shall be collectively referred to in this article as a "third party"). Employee, by participation in the Plan agrees that his estate, and the legal representative of his estate, shall likewise be obligated and that the Plan shall be fully subrogated to any recovery or right of recovery that the estate may have against any third party on account of, or arising out of, the Employee's Bodily Injury, Disease or Cumulative trauma, including without limitation, any wrongful death claim or action.

The Employee, or the legal representative or beneficiaries of Employee or his estate, shall notify the Plan Administrator of any claim or lawsuit against a third party or insurance carrier within thirty (30) days of the date that the claim is made or the lawsuit is filed. The Plan Administrator, on behalf of the Plan, also has the right to pursue any action to enforce its subrogation rights against a third party. The Plan Administrator may, in its discretion, elect not to enforce the Plan's subrogation rights to the extent consistent with its fiduciary obligations to the Plan.

11.2 Employee's Agreement to Subrogation. Employee,

on behalf of himself and each beneficiary of a payment made on Employee's behalf, by accepting benefits under the Plan, consents and agrees (i) that the Plan shall be promptly reimbursed for any payments made to or on the Employee's behalf under the Plan out of any monies recovered as the result of any lawsuit, judgment, order, award, settlement, compromise, arbitration or other arrangement, and (ii) to include all Benefits paid or payable under the Plan in any liability or other claim against a third party. Furthermore, Employee and said beneficiaries promise and agree to take such action, to furnish such information and assistance, to execute and deliver any assignments, reimbursement agreements and other instruments as the Plan Administrator may require to facilitate enforcement of The plan's subrogation rights, and not to prejudice, or in any way detrimentally affect, such rights, The Plan's subrogation rights shall not be affected by any release, including a partial release, that is extend to (a) all conceivable sources of recovery, other than the Plan itself, including, by way of example and not limitation, any and all automobile insurance coverage (including uninsured/underinsured motorist coverage), no fault coverage, medical insurance coverage, school of payments made by or on behalf of a third party, regardless of how designated, including, without limitation, payments for medical expenses, disability, accidental death or dismemberment, past or future wages or loss of earning capacity, pain and suffering, mental anguish, loss or consortium or the extent that a recovery from a third party is obtained by an attorney for the Participant, the full amount that the Plan is entitled to recover hereunder shall not be offset or otherwise reduced by any attorney's fees or other costs of recovery that were not specifically approved in

advance in writing by the Plan Administrator.

11.3 Limitation to Plan's Subrogation Rights. The Plan's subrogation rights (a) shall extend only to the recovery by the plan of (i) the Benefits that it has paid or will pay to or on behalf of the Employee and (ii) the cost of prosecuting the claim including attorney's fees and court and collection costs and (b) shall fully apply even if the Participant or beneficiary thereof has only received a partial recovery from a third party. Upon the advice of legal counsel, the Plan administrator shall create a trust in connection with the Plan to hold any monies recovered, pursuant to the provisions of this Article, which constitute "plan assets" under Erisa.

***

ArticleXIV. Interpretation and Determinations

The Administrative Committee reserves the absolute and unilateral right and power to administer and to interpret, construe and construct the terms and provisions of the Plan, including, without limitation; correcting any error or defect, supplying any omission, and reconciling any inconsistency. The Administrative Committee also reserves the absolute and unilateral right and power to make all decisions that my impact eligibility or a claim for Benefits, including findings of fact. Subject tot the claims review procedure in Section 16.2, any Determination, decision, computation, or interpretation made by the Administrative Committee under the Plan shall be final binding and conclusive on all persons and entities.

Article XV. Plan Administration

15.1 Appointment of the Committee. The Plan Sponsor shall be the Plan Administrator of the Plan. The Administrative Committee shall consist of at least one officer of the President of the Plan Sponsor. A member of the Administrative Committee shall serve at the discretion of the Board or President without compensation, but may be reimbursed for proper expenditure incurred during the course of performance of duties hereunder in accordance with applicable law or regulation.

15.2 Conduct of Committee Business.

The Administrative Committee shall elect its chairperson, who shall be am member of the Administrative Committee, and a Secretary, who may or may not be a member of the Administrative Committee, and shall appoint such subcommittees as it deems necessary or appropriate. The Administrative Committee shall conduct its business according to the provisions of this Article and shall hold meetings at any convenient location or may act in writing without a meeting. A majority of all of the members of the Administrative Committee shall have power to act with or without a meeting, and the concurrence or dissent of any member may be made in person, by telephone, telecopy or other reasonable method.

(1)

No. 05-163

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

MEMORIAL-HERMANN HEALTHCARE SYSTEMS, On Behalf and for the Benefit of The Estates, Heirs, Devisees, Legatees, Spouses, Children and/or Parents of Charles Atteberry Jr., and MEMORIAL-HERMANN HEALTHCARE SYSTEM; MEMORIAL-HERMANN HOSPITAL SYSTEM,

Petitioners,

v.

BEN ETHRIDGE and DALINDA SHELTON, CAROL ANN PITTMAN, also known as Carol Ann Peterson, Independent Executrix of the Estate of John Linwood Pittman, Jr., Deceased and Individually as Beneficiary of John Linwood Pittman, Jr.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. Does the MHHS ERISA plan contain terms that are consistent and, if so, does *Firestone Tire & Rubber Co. v. Bruch* control the Court of Appeals in its *de novo* review of the Plan.

II. If *Firestone Tire & Rubber Co. v. Bruch* controls, did the Court of Appeals correctly apply the standard to its review of the MHHS ERISA Plan?

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STATEMENT

This Statement is being made pursuant to Rule 15(2) of the Rules of the Supreme Court of the United States because of misstatement of fact and law in the petition that bears on what issues are properly before the Court if certiorari is granted.

This case arises out of the crash of a Eurocopter BK-117 helicopter. Memorial Hermann Healthcare System ("MHHS"), operates Life Flight helicopter ambulance service out of Houston, Texas. On July 17, 1999, a Life Flight helicopter crashed, killing all three MHHS' employees on board. The National Transportation and Safety Board determined that a defect in the helicopter's main rudder components caused the crash.

Sylvia Ethridge and John Pittman, Jr. were two of the MHHS employees on board. At the time of their deaths, the employees were covered by MHHS' ERISA Occupational Benefits Plan (the "Plan"), which essentially provided death benefits of $1,000,000 to the estate of the deceased employee or the employee's heir at law in the absence of a will. (App., 101 at 161).

Carol Pittman, the wife of John Pittman, Jr., was named as the Independent Executrix of John Pittman, Jr.'s Estate pursuant to the terms of the will of John Pittman, Jr. Carol Pittman was appointed as Independent Executrix of the Estate by Order of the Probate Court in a Galveston County Probate Court proceeding. Subsequently, on December 17, 1999, Carol Pittman filed a lawsuit in Probate Court against the helicopter manufacturer in two separate capacities: (1) as Executrix of the Estate of John Pittman, Jr. for the survival cause of action; and (2)

individually for her personal loss as the wife of John Pittman, Jr. for the wrongful death cause of action.

On January 25, 2000, MHHS filed a separate suit in Probate Court in Galveston County, Texas, entitled "Petition in Interpleader." In its interpleader action, MHHS pled the facts of the helicopter crash and resulting death of John Pittman, Jr. MHHS also contended that it provided benefits to its employees through the Plan. MHHS further alleged it was unable to determine who should receive benefits under the Plan. The Petition in Interpleader named as defendants Carol Pittman as the Independent Executrix of the Estate of John Linwood Pittman, Jr. and the two adult children of John Pittman, Jr., John Pittman, III and Jennifer Pittman. Concurrent with filing the Petition in Interpleader, MHHS deposited $1,000,000.00 into the registry of the Court. The Probate Court entered an Agreed Final Judgment in the interpleader case, which ordered the payment of $1,000,000.00 to "the Personal Representative of the Estate" of John Pittman, Jr. (App., 44).

Carol Pittman, in her individual capacity, has never received any payment of benefits from the Plan. Petitioner has claimed that Carol Pittman individually received benefits from the Plan. This statement is both factually and legally incorrect as more fully explained herein.

MHHS refused to recognize the findings of the Probate Court and asserted that Carol Pittman had no rights in any capacity in claims against the helicopter manufacturer, and MHHS and its attorneys proclaimed MHHS would prosecute the claim. Carol Pittman was thus forced to file a separate declaratory action in Probate Court against MHHS seeking a declaration of her rights individually and as Executrix of the Estate.

In August 2000, MHHS filed suit in federal court against the helicopter manufacturer and purportedly on behalf of the deceased employees, their estates, and their heirs. MHHS then removed Carol Pittman's declaratory action from Galveston County Probate Court to federal court. The estates and/or beneficiaries of all three decedents eventually intervened in the federal court case.

On December 1, 2000, five months subsequent to filing suit allegedly on Carol Pittman's behalf, the Plan Administrator and the Plan Committee (the "Committee") convened to determine the meaning of the Plan's subrogation provisions. The Committee determined that the Plan's subrogation provisions included the wrongful death claims based on their interpretation of the Plan. (App., 163).

MHHS and Carol Pittman filed motions for summary judgment in the district court. MHHS urged in its Motion for Partial Summary Judgment against Carol Pittman that the administrative committee correctly construed the Plan as requiring anyone who received benefits must assign all of their rights upon the request of the Plan and that Carol Pittman had received benefits. As such, according to MHHS, it had the exclusive and sole authority to prosecute all of the claims and all claims "are assigned to and belong to MHHS." Carol Pittman, Individually and as Executrix of the Estate of John Pittman, Jr. filed a cross motion in which she demonstrated that MHHS had not paid the benefits to Carol Pittman, individually, and, instead, the funds were ordered paid to the Estate of John Pittman. As such, MHHS' subrogation rights were against the Estate and not Carol Pittman, individually.

The district court heard the dispute and granted MHHS' Motion for Summary Judgment against Pittman,

ruling that the Plan was subrogated to Pittman's wrongful death claim as well as Pittman's Estate's survival action. (App., 16-43).

The Fifth Circuit specifically held that because Carol Pittman, in her individual capacity, did not receive any benefits from the Plan, MHHS was not subrogated to the wrongful death claim she independently possessed in her individual capacity as John Pittman's wife. "In other words, MHHS acquired neither subrogation rights nor control of any of Pittman's individual claims." The Fifth Circuit also held that Ben Ethridge did not receive any benefits from the Plan, and consequently, his claims were not engulfed by the Plan. (App., 1 at 11, 12).

REASONS FOR DENYING WRIT

Despite the attempts of petitioner, MHHS, to convince this Court otherwise, there is no compelling reason to grant the petition for writ of certiorari. The petitioner contends the ERISA plan contains terms that are contradictory. Upon this premise, petitioner then raises an issue as to whether *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), controls and whether a Court of Appeals may use its own rule of interpretation, as it contends the Fifth Circuit did in its review. The terms of the plan are not contradictory, however, and the Plan Committee's ("Committee") decision was in direct conflict with the plain meaning of the Plan language. Moreover, the *Firestone Tire & Rubber Co. v. Bruch* standard – abuse of discretion – was correctly utilized by the Fifth Circuit, and it did not supplant its judgment for that of the Committee. Furthermore, MHHS essentially requests this Court to eviscerate the liberal abuse of discretion standard and impose

a standard of mere dishonesty or beyond the bounds of a reasonable judgment. MHHS' position concerning this standard is beyond troubling; it is intellectually dishonest.

I. WHILE CONGRESS HAS DETERMINED THAT THE REGULATION OF ERISA PLANS EFFECTS OUR FUNDAMENTAL NATIONAL ECONOMIC SECURITY, ERISA DOES NOT CONTROL CAROL PITTMAN'S INDIVIDUAL CLAIMS

Respondent concurs with petitioner's assertion that Congress acknowledged the importance of ERISA's role in connection with national economic security. Congress proclaimed ERISA's significance requires minimum standards be provided to assure financial health of ERISA plans. Petitioner, however, failed to address that this policy is counterbalanced by the policy to protect employees and their families. A primary purpose of ERISA, was for the protection of employees. *See* 29 U.S.C.A. §§ 1001-1001b (West 2005); H.R. 93-533; 93d Cong. (1973). Congress found that "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by . . . [ERISA] plans." 29 U.S.C.A. § 1001(a)(3) (West 2005). Thus, Congress further found the promulgation of ERISA "desirable to increase the likelihood of protecting plan participants against benefit losses." *Id.* at § 1001a(b)(1). Accordingly, one of the express policies of ERISA is to "provide reasonable protection for the interests of participants and beneficiaries of financially distressed multi-employer pension plans." *Id.* at § 1001(a)(c)(3). Fund mismanagement and its resulting harm to employees was a central purpose for the enactment of ERISA. *See id.* at § 1001b(a)(1), (2).

Petitioner also failed to state a salient fact that is the crux of this case. Respondent, in her individual capacity, is not a participant or beneficiary to the Plan. She is an independent third party. ERISA was enacted to "promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983). Accordingly, the ERISA statute and its importance to economic security is inapplicable. MHHS' attempt to bait this Court with platitudes concerning national economic security is disingenuous.

II. THE FIFTH CIRCUIT APPLIED THE APPROPRIATE STANDARD

Petitioner next argues that the Plan language was inconsistent and that the Committee's reconciliation of this inconsistency is governed by a standard codified in the RESTATEMENT (THIRD) OF TRUSTS § 87. Neither supposition is correct.

1. The Committee Was Governed by an Abuse of Discretion Standard

It is axiomatic that the standard applied to an ERISA plan is abuse of discretion when an ERISA plan vests in its administrator discretionary authority to determine eligibility and interpret the plan. *Gooselink v. American Tel. & Tel. Inc.*, 272 F.3d 722, 726 (5th Cir. 2001); *Threadgill v. Prudential Sec. Group, Inc.*, 145 F.3d 286, 292 (5th Cir. 1998); *Pickrom v. Belger Cartage Serv., Inc.*, 57 F.3d 468, 471 (5th Cir. 1995); *Wildbur v. Arco Chemical Co.*, 974 F.2d 631, 637 (5th Cir. 1992); *Bourgeois v. Pension Plan For the Employees of Santa Fe Int'l Corp.*, 308 F. Supp. 2d 761, 763 (S.D. Tex. 2004). This standard applies not only to actions concerning benefit determinations brought by participants